DOCKET

No. 13-550

Title:	Glenn Tibble, et al., Petitioners
	v.
	Edison International, et al.
Docketed:	November 1, 2013
Lower Ct:	United States Court of Appeals for the Ninth Circuit
Case Nos.:	(10-56406, 10-56415)
Decision Date:	March 21, 2013
Rehearing Denied:	August 1, 2013

Questions Presented

---Date---	------Proceedings and Orders----------
Oct 30 2013	Petition for a writ of certiorari filed. (Response due December 2, 2013)
Nov 15 2013	Waiver of right of respondents Edison International, et al. to respond filed.
Nov 26 2013	DISTRIBUTED for Conference of December 13, 2013.
Dec 9 2013	Response Requested. (Due January 8, 2014)
Dec 12 2013	Order extending time to file response to petition to and including February 7, 2014.
Feb 7 2014	Brief of respondents Edison International, et al. in opposition filed.
Feb 21 2014	Reply of petitioners Glenn Tibble, et al. filed.
Feb 26 2014	DISTRIBUTED for Conference of March 21, 2014.
Mar 3 2014	Supplemental brief of petitioners Glenn Tibble, et al. filed. (Distributed)
Mar 20 2014	Letter of March 20, 2014, from counsel for respondents received. (Distributed)
Mar 24 2014	The Solicitor General is invited to file a brief in this case expressing the views of the United States.
Aug 15 2014	Letter of August 15, 2014, from counsel for respondents received.
Aug 19 2014	Brief amicus curiae of United States filed.
Sep 3 2014	Supplemental brief of respondents Edison International, et al. filed.
Sep 10 2014	DISTRIBUTED for Conference of September 29, 2014.
Oct 2 2014	Petition GRANTED limited to the following question: "Whether a claim that ERISA plan fiduciaries breached their duty of prudence by offering higher-cost retail-class mutual funds to plan participants, even though identical lower-cost institution-class mutual funds were available, is barred by 29 U.S.C. 1113(1) when fiduciaries initially chose the higher-cost mutual funds as plan investments more than six years before the claim was filed." .
Oct 30 2014	The time to file the joint appendix and petitioners' brief on the merits is extended to and including December 2, 2014.
Oct 30 2014	The time to file respondents' brief on the merits is extended to and including January 16, 2015.
Oct 30 2014	Petitioners' will file their reply brief on the merits on or before February 13, 2015.

Nov 6 2014	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for the petitioners.
Nov 24 2014	Consent to the filing of amicus curiae briefs, in support of either or of neither party, received from counsel for the respondents.
Dec 2 2014	Joint appendix filed. (Statement of costs filed)
Dec 2 2014	Brief of petitioners Glenn Tibble, et al. filed.
Dec 9 2014	Brief amicus curiae of United States filed.
Dec 9 2014	Brief amicus curiae of Cambridge Fiduciary Services LLC filed.
Dec 9 2014	Brief amici curiae of Law Professors filed.
Dec 9 2014	Brief amicus curiae of Pension Rights Center filed.
Dec 9 2014	Brief amicus curiae of AARP filed.
Dec 22 2014	SET FOR ARGUMENT ON Tuesday, February 24, 2015
Dec 22 2014	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
Dec 22 2014	Record requested from U.S.C.A. 9th Circuit.
Dec 22 2014	Record from U.S.C.A. 9th Circuit is electronic and located on PACER.
Jan 7 2015	CIRCULATED.
Jan 8 2015	Record received from U.S.D.C. Central Dist. of California Western Division. The record is electronic and located on PACER, also received 1 Envelope of Exhibits.
Jan 16 2015	Brief of respondents Edison International, et al. filed. (Distributed)
Jan 23 2015	Brief amicus curiae of The ESOP Association filed. (Distributed)
Jan 23 2015	Brief amici curiae of National Association of Manufacturers, et al. filed. (Distributed)
Jan 23 2015	Brief amicus curiae of Securities Industry and Financial Markets Association filed. (Distributed)
Jan 23 2015	Brief amicus curiae of DRI - The Voice of the Defense Bar filed. (Distributed)
Jan 26 2015	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
Feb 13 2015	Reply of petitioners Glenn Tibble, et al. filed. (Distributed)
Feb 19 2015	Letter from counsel for the respondents filed.
Feb 24 2015	Argued. For petitioners: David C. Frederick, Washington, D. C.; and Nicole A. Saharsky, Assistant to the Solicitor General, Department of Justice, Washington, D. C. (for United States, as amicus curiae.) For respondents: Jonathan D. Hacker, Washington, D. C.
May 18 2015	Judgment VACATED and case REMANDED. Breyer, J., delivered the opinion for a unanimous Court.
Jun 19 2015	JUDGMENT ISSUED.

PETITION FOR WRIT OF CERTIORARI

13- 550

No. _____

In The

Supreme Court of the United States

GLENN TIBBLE, et al.,

Petitioners,

v.

EDISON INTERNATIONAL, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Employee Retirement Income Security Act of 1974 (ERISA) imposes duties on retirement plan fiduciaries that are "the highest known to the law", and provides a six-year statute of limitations for plan participants to pursue an action for breach of those duties. Although Plaintiffs obtained a judgment that their 401(k) plan fiduciaries had breached their duties by selecting certain investment funds for their plan within six years of the complaint, the Ninth Circuit held that an identical claim as to other funds that were imprudent for the same reason, and continued to harm Plaintiffs at the time of their complaint, was time-barred because the funds were initially selected more than six years earlier. The Ninth Circuit also replaced ERISA's stringent fiduciary standard with the deferential standard of review that *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989) adopted in §1132(a)(1)(B) actions challenging denials of benefits.

The questions presented are:

1. Notwithstanding the ongoing nature of ERISA's fiduciary duties, does the statute of limitations under 29 U.S.C. §1113(1) immunize 401(k) plan fiduciaries for retaining imprudent investments that continue to cause the plan losses if the funds were first included in the plan more than six years ago?

QUESTIONS PRESENTED – Continued

2. Does *Firestone* deference apply to fiduciary breach actions under 29 U.S.C. §1132(a)(2), where the fiduciary allegedly violated the terms of the governing plan document in a manner that favors the financial interests of the plan sponsor at the expense of plan participants?

LIST OF PARTIES TO THE PROCEEDING

Petitioners Glenn Tibble, William Bauer, William Izral, Henry Runowiecki, Frederick Suhadolc, and Hugh Tinman, Jr. were plaintiffs in the district court and appellants/cross-appellees in the court of appeals.

Respondents Edison International, The Edison International Benefits Committee, fka The Southern California Edison Benefits Committee, Edison International Trust Investment Committee, Secretary of the Edison International Benefits Committee, Southern California Edison's Vice President of Human Resources, and Manager of Southern California Edison's HR Service Center were defendants in the district court and appellees/cross-appellants in the court of appeals.

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Glenn Tibble, William Bauer, William Izral, Henry Runowiecki, Frederick Suhadolc, and Hugh Tinman Jr. respectfully petition the Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The amended opinion of the court of appeals is reported at ___ F.3d ___ (2013 U.S. App. LEXIS 16050), and reprinted at App. 1-64. The original opinion is reported at 711 F.3d 1061.

The district court's post-trial Findings of Fact and Conclusions of Law (unpublished, available at 2010 U.S. Dist. LEXIS 69119), is reprinted at App. 65-165. The district court's order granting summary judgment in part, is reported at 639 F. Supp. 2d 1074, and reprinted at App. 166-268.

JURISDICTION

The court of appeals issued its opinion and judgment on March 21, 2013. 711 F.3d 1061. The court of appeals issued an amended opinion and denied Petitioners' petition for rehearing on August 1, 2013. App. 3, 6, 12. The Court has jurisdiction to

issue a writ of certiorari in this case under 28 U.S.C. §1254(1) and Rule 13.3.

STATUTORY PROVISIONS INVOLVED

29 U.S.C. §1104(a)(1) [ERISA §404(a)(1)]:

> **(a) Prudent man standard of care**
>
> (1) Subject to sections 1103(c) and (d), 1342, and 1344 of this title, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and –
>
> (A) for the exclusive purpose of:
>
> (i) providing benefits to participants and their beneficiaries; and
>
> (ii) defraying reasonable expenses of administering the plan;
>
> (B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;
>
> (C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and

(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this subchapter and subchapter III of this chapter.

29 U.S.C. §1109(a) [ERISA §409(a)]:

(a) Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary. A fiduciary may also be removed for a violation of section 1111 of this title.

29 U.S.C. §1113 [ERISA §413]:

No action may be commenced under this title with respect to a fiduciary's breach of any responsibility, duty, or obligation under this part, or with respect to a violation of this part, after the earlier of –

(1) six years after

(A) the date of the last action which constituted a part of the breach or violation, or

(B) in the case of an omission, the latest date on which the fiduciary could have cured the breach or violation, or

(2) three years after the earliest date on which the plaintiff had actual knowledge of the breach or violation;

except that in the case of fraud or concealment, such action may be commenced not later than six years after the date of discovery of such breach or violation.

29 U.S.C. §1132 [ERISA §502]:

(a) Persons empowered to bring a civil action

A civil action may be brought –

(1) by a participant or beneficiary –

(A) for the relief provided for in subsection (c) of this section, or

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title;

(3) by a participant, beneficiary, or fiduciary

(A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or

(B) to obtain other appropriate equitable relief

(i) to redress such violations or

(ii) to enforce any provisions of this subchapter or the terms of the plan;.

STATEMENT OF THE CASE

"Defined contribution plans dominate the retirement plan scene today." *LaRue v. DeWolff, Boberg & Assocs.*, 552 U.S. 248, 255 (2008). This case presents important questions of the federal law governing these plans, which the court below decided in a way that conflicts with the decisions of other courts of appeals and the position of the United States Secretary of Labor. The resolution of these questions will greatly affect the retirement system throughout the United States.

The court below applied ERISA's statute of limitations to bar an action to redress fiduciary breaches in a way that destroys the protection of ERISA's stringent fiduciary duties and that conflicts with the Second and Seventh Circuits and the view of the Secretary of Labor. This Court has not addressed the statute of limitations.

The court below extended this Court's decisions in *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989), and *Conkright v. Frommert*, 559 U.S. 506 (2010), beyond the scope to which the Court limited those decisions in a way that conflicts with the Second and Third Circuits and undermines ERISA's stringent fiduciary duties.

In light of this conflict in the Circuit Courts of Appeals, because the answers to the questions presented have profound consequences for the retirement security of over fifty million individuals throughout the United States whose retirement assets include a 401(k) plan,[1] and because the Ninth Circuit's answers so drastically undermine ERISA's fiduciary protections, the Court should issue its writ to address both questions presented.

A. Statutory Background.

Congress, aware of the critical importance of retirement plans to the American economy and American workers, passed ERISA to "assur[e] the equitable character of [employee benefit plans] and their financial soundness." *Central States, S.E. & S.W. Areas Pension Fund v. Central Transp., Inc.*, 472 U.S. 559, 570 (1985). In enacting ERISA, "the crucible of congressional concern was misuse and mismanagement

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[1] Investment Company Institute, *Frequently Asked Questions About 401(k) Plans*, available at: http://www.ici.org/policy/retirement/plan/401k/faqs_401k.

of plan assets by plan administrators." *Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 140 n.8 (1985). To address that concern, ERISA imposes strict fiduciary duties, "the highest known to the law." *Johnson v. Couturier*, 572 F.3d 1067, 1082 (9th Cir. 2009) (quoting *Howard v. Shay*, 100 F.3d 1484, 1488 (9th Cir. 1996)); see also *Donovan v. Bierwirth*, 680 F.2d 263, 272 n.8 (2d Cir. 1982) (Friendly, J.).

The fundamental fiduciary duties are stated in ERISA's "Prudent man standard of care" which in pertinent part states:

> a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and –
>
> > (A) for the exclusive purpose of: (i) providing benefits to participants and their beneficiaries; and (ii) defraying reasonable expenses of administering the plan;
> >
> > (B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims; and
> >
> > (D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the

> provisions of this subchapter and subchapter III of this chapter.

29 U.S.C. §1104(a)(1). ERISA also prohibits specific transactions *per se*, including self-dealing and conflicts of interest by fiduciaries. 29 U.S.C. §1106. "[T]he assets of a plan shall never inure to the benefit of any employer[.]" 29 U.S.C. §1103(c)(1).

> A fiduciary in breach of its duty is
>
> personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary[.]

29 U.S.C. §1109(a). ERISA authorizes any plan participant to bring an action to enforce the plan's right to relief under §1109(a). 29 U.S.C. §1132(a)(2). The time in which the participant must commence that action is stated in 29 U.S.C. §1113, which in pertinent part provides,

> No action may be commenced under this subchapter with respect to a fiduciary's breach of any responsibility, duty, or obligation under this part, or with respect to a violation of this part, after . –
>
> (1) six years after (A) the date of the last action which constituted a part

> of the breach or violation, or (B) in the case of an omission the latest date on which the fiduciary could have cured the breach or violation[.]

B. Factual Background.

Petitioners are participants in the Edison 401(k) Savings Plan ("the Plan"), an individual account, defined contribution plan under ERISA sponsored by Edison International ("Edison"). App. 13-14; see 29 U.S.C. §1002(2)-(3), (34). The Plan has 20,000 participants and holds approximately $3.8 billion in assets. App. 13. The Plan's multi-billion dollar size afforded it access to the institutional investment market, with concomitant lower fees compared to the retail market. App. 183-84; Doc. 186 at 11-12;[2] see *Jones v. Harris Assocs. L.P.*, 559 U.S. 335, 349-50 (2010).

Respondents are the fiduciaries to the Plan. App. 71-72; see 29 U.S.C. §1002(21)(A), §1102(a)(1). Respondents are responsible for the investments in the Plan into which participants could invest their retirement savings and are obligated to provide only prudent investments. App. 72; 29 U.S.C. §1104(a)(1)(A)-(B).

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[2] "Doc." refers to the ECF document number in the district court, No. 07-5359 (C.D.Cal.). All "Doc." page references are to the ECF header page.

The document governing the Plan provides in §19.02 that, "The cost of the administration of the Plan will be paid by the Company." App. 36;[3] see 29 U.S.C. §1102. In administering the Plan, Respondents were obligated to follow that requirement. 29 U.S.C. §1104(a)(1)(D). A significant cost of administration in a 401(k) plan is the recordkeeping of individual accounts. See United States Dep't of Labor, Employee Benefits Security Administration, *Understanding Retirement Plan Fees and Expenses* 3 (2011).[4] Until 1999, Edison paid those costs. App. 170.

In 1999 Respondents added mutual funds to the Plan. App. 36. Six of those mutual funds had two share classes: a retail share class and an institutional share class. App. 84. Both share classes invested identically in the same securities by the same managers. App. 61, 84, 92, 94, 95-97, 128-29. The sole difference was that the retail share class charged significantly higher fees. App. 61, 84, 92, 94-97, 128-29. A portion of those higher fees in the retail class shares was shared by the mutual funds with the Plan's recordkeeper, which in turn reduced the cost of administration of the Plan that Edison had to pay.

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[3] Section 19.20 was amended in 2006 to provide, "The cost of the administration of the Plan, net of any adjustments by service providers, will be paid by the Company." App. 37.

[4] Available at: http://www.dol.gov/ebsa/pdf/undrstndgrtrmnt.pdf.

App. 14, 36.[5] Edison thereby reduced its obligation to pay the costs of administration by $8 million, which costs were borne directly by participants through the higher fees deducted from their retail mutual fund investments. Doc. 186-2 at 8 (¶31); Doc. 205 at 29 (¶40).

Petitioners contend their fiduciaries breached their duties under 29 U.S.C. §1104(a)(1)(A) and (B) by selecting and continuing to invest in the significantly higher-cost retail share classes of these mutual funds when identical investments were available in the institutional share classes for lower fees, and breached their duties under 29 U.S.C. §1104(a)(1)(D) by causing participants to pay costs of Plan administration (recordkeeping) through revenue sharing, when Plan §19.02 obligated Edison to pay the Plan's administrative costs.[6]

C. Proceedings Below.

1. The District Court's summary judgment and trial judgment.

Petitioners commenced their action on behalf of the Plan under 29 U.S.C. §1132(a)(2) and (3) on August 16, 2007 in the United States District Court for the Central District of California. Doc. 1. That

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[5] This fee sharing arrangement is known as "revenue sharing." App. 14, 36.

[6] Other claims of fiduciary breach were asserted and adjudicated, but are not at issue in this petition.

court had jurisdiction under 29 U.S.C. §1132(e)(1) and (f) and 28 U.S.C. §1331. The district court certified all of Petitioners' claims as a class action on behalf of all participants in the Plan under Federal Rule of Civil Procedure 23(b)(1)(A). App. 14; Doc. 286; Doc. 308.

In granting summary judgment for the Respondents, the district court held that Petitioners' claims over the imprudent and disloyal mutual funds, including the failure to use institutional rather than retail share classes, was barred as to any mutual funds first included in the Plan more than six years before Petitioners commenced their action, even though the high priced retail mutual funds remained in the Plan year after year thereafter. App. 181, 247-48, 262-63. The court's ruling was made despite the fact that some class members first joined the 401(k) Plan within the six year period, yet will have no opportunity to bring an action for Respondents' fiduciary breach. The court also held that it must defer to Respondents' interpretation of Plan §19.02 to mean that Edison had to pay only the *net* cost of Plan administration after using revenue sharing paid by Plan participants in the mutual fund expense ratios. App. 211. Because the Plan did not "unambiguously prohibit revenue sharing from the mutual funds to be used to pay for recordkeeping costs", the court found Respondents entitled to judgment as a matter of law on the §1104(a)(1)(D) claim. App. 218-19.

After a bench trial on the balance of Petitioners' claims, the district court found Respondents in fact

breached their fiduciary duties providing retail instead of institutional shares of three Plan mutual funds that were first included in the Plan after August 16, 2001, within six years before Petitioners commenced their action. App. 65, 69, 142, 164. Thus, the court found that the inclusion of funds which assessed unnecessary fees was substantively imprudent under ERISA, even though it had granted summary judgment as to other funds selected before that date that were imprudent for the same reason. The court entered judgment awarding the Plan $370,732 in damages and ordered Respondents to use institutional class shares of one of the retail mutual funds that remained in the Plan. Doc. 413; App. 15. Petitioners timely appealed and Respondents cross-appealed. App. 15.

2. The Circuit Court's affirmance and original opinion.

The United States Court of Appeals for the Ninth Circuit affirmed the district court in all respects. App. 1-64. Although the court agreed that it is a breach of duty to provide a plan higher-cost share classes of mutual funds when otherwise identical lower-cost shares were available, App. 60-64, it did not apply that principle to the three higher-cost mutual funds that had been in the Plan for more than six years, App. 16-19. The court held that §1113(1) barred any claim of fiduciary breach as to those mutual funds because plan fiduciaries have no duty to review and remove imprudent or disloyal investments from a

plan unless there are "changed circumstances" significant enough to warrant a "full due diligence review of the funds[.]" App. 18-19. The court reasoned that "[c]haracterizing the mere continued offering of a plan option, without more" as a continuing breach of duty would render the limitations period meaningless. App. 18.

The court also affirmed that the fiduciaries' interpretation of Plan §19.02 to mean "cost of administration" *net* of revenue sharing offsets was entitled to deference under *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989). App. 35-45. The court acknowledged that *Firestone* expressly limits its holding to "actions challenging denials of benefits" under 29 U.S.C. §1132(a)(1)(B), but held that the same deference should extend to fiduciary breach actions under 29 U.S.C. §1132(a)(2). App. 38, 41. According to the court's original opinion, it was joining the Third and Sixth Circuits in rejecting the Second Circuit's position that *Firestone* deference does not apply "in cases implicating ERISA § 404 fiduciary duties[.]" 711 F.3d at 1077-78 (citing *John Blair Communs., Inc. Profit Sharing Plan v. Telemundo Group., Inc. Profit Sharing Plan*, 26 F.3d 360, 369-70 (2d Cir. 1994); *Moench v. Robertson*, 62 F.3d 553, 565 (3d Cir. 1995); and *Hunter v. Caliber Sys.*, 220 F.3d 702, 711-12 (6th Cir. 2000)). While acknowledging that *Firestone* expressed "no view as to the appropriate standard of review for actions under other remedial provisions of ERISA," the court

had "little doubt" that *Firestone* deference applied to ERISA actions "globally", "across the board[.]" *Id.*

3. The Circuit Court's amended opinion.

Petitioners timely filed a petition for rehearing by the panel or the court en banc. App. 12. In denying that petition, the court amended its opinion regarding application of *Firestone* deference to this case. App. 6-12. In the amended opinion the court held that this case was distinguishable from *John Blair* because those fiduciaries attempted to use their interpretation of the plan as a means of avoiding liability for violating §1104(a)(1)(B). App. 7-9, 39-40. In contrast, the court held, Petitioners contended only that Respondents violated §1104(a)(1)(D), not §1104(a)(1)(B). App. 8-10, 40-41. Since §1104(a)(1)(D) concerns only a violation of plan documents, the court reasoned, fiduciaries were entitled to deference as to their interpretation of plan terms they allegedly breached. App. 8-10, 40-41.

Acknowledging that this Court has never applied *Firestone* deference outside of benefits claims under §1132(a)(1)(B), the court held that *Firestone* deference should nonetheless apply to fiduciary breach actions for three reasons. App. 10-12, 38, 41-43. First, the court believed the common law trust principles on which *Firestone* was based applied equally to fiduciary breach actions as well as to benefits claims appeals. App. 10-11, 41-42. Second, the court believed *Firestone* deference in fiduciary breach actions was

necessary to maintain uniformity of plan interpretation. App. 11, 42-43. And third, the court believed *Firestone* deference helps "keep administrative and litigation expenses under control[.]" App. 11-12, 43 (citing *Conkright*, 132 S.Ct. at 1646, 1649-50).

REASONS FOR GRANTING THE PETITION

The Ninth Circuit's application of §1113(1) and *Firestone* deference to this case conflicts with the decisions of other courts of appeals and the view of the Secretary of Labor, and severely undermines the protections ERISA provides to plan participants. It is wrong and should be corrected by the Court for these reasons.

I. The Ninth Circuit's application of §1113(1) disregards the text of the statute, obliterates a fiduciary's continuing duty to remove imprudent investments from a 401(k) plan, and conflicts with Second and Seventh Circuit precedent and the position of the Secretary of Labor.

A. The text of §1113(1) incorporates the concept of a fiduciary's continuing duty to provide only prudent investments in a plan regardless of when the investments were first selected.

Section 1113 differs from most limitations statutes in not starting the limitations period until the

"date of the last action which constituted a part of the breach" or in the case of breach by omission "the latest date on which the fiduciary could have cured the breach[.]" 29 U.S.C. §1113(1). It incorporates the concept that a plan fiduciary's duty is a continuing duty that does not expire and immunize fiduciaries after six years. For so long as a fiduciary continues to breach its duty by providing imprudent plan investments, the fiduciary remains liable for the plan's damages resulting from that breach within the six years preceding the filing of a fiduciary breach action. In that way, participants who only recently joined the plan would not be time-barred from enforcing their rights to prudent management merely because the investment options were first included more than six years earlier.

B. The Second and Seventh Circuits, and numerous District Courts, recognize the continuing nature of the fiduciary's duty to provide only prudent investments to a plan and apply §1113(1) accordingly.

The Seventh Circuit recognized the continuing nature of ERISA's fiduciary duties in *Martin v. Consultants & Administrators, Inc.*, 966 F.2d 1078 (7th Cir. 1992). It there rejected an argument that if the initial breach occurred outside of the limitations period, then a claim for similar misconduct within the statutory period was time-barred. The Seventh Circuit explained that the flaw in this argument is that

> it ignores the continuing nature of a trustee's duty under ERISA to review plan investments and eliminate imprudent ones. *See* 29 U.S.C. § 1104(a)(1)(B); *Morrissey v. Curran*, 567 F.2d 546, 549 n. 9 (2d Cir. 1977). If knowledge of an ERISA violation barred claims based on similar future conduct, this continuing fiduciary duty would be severely weakened, and trustees would be left free to engage in repeated violations, so long as they have once been discovered but not sued. *Buccino v. Continental Assurance Co.*, 578 F. Supp. 1518, 1521 (S.D.N.Y. 1983)

Id. at 1087-88. "[G]iven ERISA's imposition of a continuing fiduciary duty, past knowledge of a past violation generally should not be held to preclude a suit for a repeated or continued violation." *Id.* at 1089.[7] The Second Circuit in *Morrissey* noted that ERISA's prudent man standard incorporates the duty under the common law of trusts "to dispose of improper investments within a reasonable time[.]" *Id.* at 548-49 and n.9. *Morrissey* further noted that ERISA's "requirement that fiduciaries take remedial action upon discovery of breaches by co-fiduciaries" also is an express recognition of the ongoing nature of the obligation to review and eliminate improper investments from a plan. *Id.* at 549 n.9 (citing 29 U.S.C. §1105(a)(3)).

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[7] Here, numerous participants would be barred from making claims before they were ever in the Plan and could have had any such knowledge.

Numerous District Courts likewise have recognized the continuing nature of a fiduciary's duties under ERISA and applied §1113(1) accordingly, barring only those breaches that occurred outside of six years and not those that occurred within six years. E.g., *Leber v. Citigroup, Inc.*, No. 07-9329, 2011 U.S. Dist. LEXIS 129444 at *14-15 (S.D.N.Y. Nov. 8, 2011); *George v. Kraft Foods Global, Inc.*, 814 F. Supp. 2d 832, 852 (N.D. Ill. 2011); *Mahoney v. J.J. Weiser & Co.*, 564 F. Supp. 2d 248, 259 (S.D.N.Y. 2008); *Boeckman v. A.G. Edwards Inc.*, 461 F. Supp. 2d 801, 814 (S.D. Ill. 2006); *Meyer v. Berkshire Life Ins. Co.*, 250 F. Supp. 2d 544, 570 (D. Md. 2003); *Harris Trust & Sav. Bank v. John Hancock Mut. Life Ins. Co.*, 122 F. Supp. 2d 444, 463 (S.D.N.Y. 2000); *Reich v. Johnson*, 891 F. Supp. 208, 209 (D.N.J. 1995); *Dole v. Formica*, No. 87-2955, 1991 U.S. Dist. LEXIS 19743 at *20-21 (N.D. Ohio Sept. 30, 1991); *Howard Electric, Inc. v. American Bank & Trust Co.*, No. 88-20399, 1990 U.S. Dist. LEXIS 7704 at *19-21, 32-34 (N.D. Cal. Apr. 2, 1990); *Buccino v. Continental Assurance Co.*, 578 F. Supp. 1518, 1521 (S.D.N.Y. 1983).

"In light of the continuing duty of prudence imposed on plan fiduciaries by ERISA, each failure to exercise prudence constitutes a new breach of duty, that is to say, a new claim." *Boeckman*, 461 F. Supp. 2d at 814. Fiduciaries are "under a continuing obligation to advise the Fund to divest itself of unlawful or imprudent investments" and failure to do so gives rise to a new cause of action for each loss the plan suffers. *Buccino*, 578 F. Supp. at 1521. To hold otherwise

> would recognize no obligation on the part of a plan fiduciary to dispose of unsound investments once he had been neglectful for six years, because only the initial failure to act, not subsequent failures, would give rise to a cause of action, and that action would be time barred.

Buccino, 578 F. Supp. at 1521. The same reasoning applies here. The court actually found at trial that it is a breach to use higher-cost retail mutual fund shares instead of institutional shares as plan investments. It follows without question that it is a continuing breach to keep those shares in the plan even after six years have elapsed. The Ninth Circuit has granted immunity *for all time* for these plan fiduciaries to continue conduct that has been found herein to be a fiduciary breach. Under the Ninth Circuit's decision, a participant could not even ask the court for injunctive relief to compel plan fiduciaries to switch the plan from the higher-cost to the lower-cost shares, since under the Ninth Circuit's reasoning that claim is barred under §1113(1) because the imprudently expensive shares have been in the plan more than six years. That completely distorts a limitation that expressly does not begin until the "last action constituting a part of the breach" and completely destroys any sense of the fiduciary having a continuing duty to provide participants only prudent investment options. The Ninth Circuit wholly ignored these contrary decisions, in a decision that will have profound consequences for the retirement system in America. App. 17-19.

C. The Secretary of Labor agrees with the Second and Seventh Circuits and the Petitioners.

The United States Secretary of Labor is charged with enforcing ERISA. 29 U.S.C. §§1131-1136. She filed an amicus curiae brief with the Ninth Circuit in this appeal to express her long-standing agreement with Petitioners' interpretation of §1113(1). Br. for Sec'y of Labor as Amicus Curiae In Support of Plaintiffs-Appellants at 12-19, *Tibble v. Edison Int'l*, No. 10-56406 (May 25, 2011). The Secretary holds that "plan fiduciaries owe a continuing, and not merely a one-time, duty to act prudently with regard to the management of the plan and the investment of plan assets." *Id.* at 14. In this case, "Plan fiduciaries had a continuing obligation to manage Plan investments and eliminate imprudent ones," and thus, could not forever "turn a blind eye" to the imprudence of higher-cost share classes of Plan mutual funds "merely because they had engaged in such conduct for more than six years." *Id.* at 7-8. This is the same interpretation of §1113(1) that the Secretary has asserted in numerous other ERISA appeals. Br. of Sec'y of Labor as Amicus Curiae, *Tussey v. ABB, Inc.*, No. 12-2056 (8th Cir. June 17, 2013); Br. of Acting Sec'y of Labor as Amicus Curiae in Support of Pet. for Reh'g En Banc or Panel Reh'g, *David v. Alphin*, 704 F.3d 327 (4th Cir. Feb. 28, 2013); Br. of Sec'y of Labor as Amicus Curiae in Support of Plaintiffs-Appellants Urging Reversal, *David v. Alphin*, 704 F.3d 327 (4th Cir. Dec. 28, 2011); Br. of Sec'y of Labor as Amicus

Curiae, *Kanawi v. Bechtel Corp.*, No. 09-16253 (9th Cir. Dec. 28, 2009). A contrary interpretation, the Secretary notes, fundamentally misinterprets ERISA because it gives fiduciaries a "*perpetual license to do nothing about the current imprudence of an investment option so long as no material change in circumstances intervenes.*" *David* Reh'g Br. at 12-13 (emphasis added). That improperly would leave a fiduciary free from any enforceable duty to review and remove imprudent investments from a plan once the funds have been in the plan for six years. *Id.* at 13. That also improperly would bar new participants who had no previous opportunity to challenge the investment selections from ever enforcing their ERISA rights to prudent management. *Id.* at 15.

In sum, the Secretary has taken the consistent position that §1113(1) cannot bar claims of fiduciary breach that occur within six years of commencement merely because the breaches began more than six years before. That position represents "the agency's fair and considered judgment on the matter," and thus warrants deference from the courts. *Auer v. Robbins*, 519 U.S. 452, 462 (1997); *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 171 (2007). The Ninth Circuit, however, gave no deference to the Secretary's interpretation. App. 17-19.

D. The Ninth Circuit's reasoning is unfounded and conflicts with other Circuits.

For its application of §1113(1) to this case, the Ninth Circuit relied principally on two decisions: *David v. Alphin*, 817 F. Supp. 2d 764 (W.D.N.C. 2011), *aff'd*, 704 F.3d 327 (4th Cir. 2013), and *Phillips v. Alaska Hotel & Restaurant Employees Pension Fund*, 944 F.2d 509 (9th Cir. 1991). App. 17-18. Those decisions are inapposite for the following reasons.

David is inapposite because the Fourth Circuit expressly held that, given the procedural posture of that appeal, it did not "decide whether ERISA fiduciaries have an ongoing duty to remove imprudent investment options in the absence of a material change in circumstances[.]" 704 F.3d at 341. *David* thus did not even address the Secretary of Labor's arguments or the cases cited above compelling an interpretation of §1113(1) consonant with a fiduciary's continuing duties. That is the question to be addressed in this appeal. The Ninth Circuit is the only appellate court to have rejected the continuing nature of ERISA's fiduciary duties and instead put a six-year expiration date on those duties with its resulting immunity for all time.

Phillips is inapposite because it concerned the three-year, actual knowledge limitation of 29 U.S.C. §1113(2). 944 F.2d at 520-21; App. 17. The Ninth Circuit extended the logic of *Phillips* to the six-year limitation, disregarding the fact that the three-year

limitation starts upon the *first* date that a plaintiff has actual knowledge of the breach, whereas the six-year limitation starts upon the *last* date of the fiduciary breach. 29 U.S.C. §1113(2). The court expressed two reasons for extending *Phillips*. First, it held that the continuing nature of a fiduciary's duty to maintain only prudent investments in a plan is incorporated only in §1113(1)(B) regarding breaches by omission and could not also be incorporated in §1113(1)(A) regarding breaches by commission without rendering §1113(1)(B) "surplusage." App. 18 (citing *Freeman v. Quicken Loans, Inc.*, 132 S.Ct. 2034, 2043 (2012)). But the Ninth Circuit's interpretation itself renders "last action which constituted a part of the breach" in §1113(1)(A) superfluous. Indeed, the court inverts that clause to start the limitation running from the *first* action which constituted a part of the breach (such as the initial selection of an imprudent fund). The canon of statutory construction on which the Ninth Circuit relied, see App. 18, "assists only where a competing interpretation gives effect to every clause and word of a statute." *Microsoft Corp. v. i4i Ltd. P'ship*, 564 U.S. ___, 131 S.Ct. 2238, 2248 (2011). The Ninth Circuit's interpretation deprives the "last action" clause of §1113(1)(A) of any effect, and thus provides no assistance in interpreting the statute. Moreover, Petitioners repeatedly informed the Ninth Circuit that they contended Respondents' breaches were both acts of commission and omission and thus within the scope of both parts (A) and (B) of §1113(1). First Br. at 16, 20; Third Br. at 29-30. Thus, the court's parsing of the distinction

between acts of commission or omission was irrelevant to this appeal.

The second reason why the Ninth Circuit extended *Phillips* to §1113(1) was its concern that the Secretary's and the Second and Seventh Circuits "continuing duty" interpretation of §1113 would render fiduciaries forever liable for "decisions which may have been made decades before and as to which institutional memory may no longer exist." App. 18 (quoting *David*, 817 F. Supp. 2d at 777).[8] That concern, of course, cannot trump the plain language of the statute, which does not start the limitations period until the "last action which constituted a part of the breach[.]" A fiduciary cognizant of its continuing duty to have only prudent investments in a plan will retain the documentation of the reasoning on which that continuing decision is based. Even if such institutional memory no longer exists decades after the initial decision, it does not follow that the fiduciaries currently responsible should be relieved of the obligation to determine whether investments remain prudent and fees competitive based on current market conditions. 29 U.S.C. §1104(a)(1)(B) (prudent man standard requires fiduciary to act with the requisite care and prudence "under the circumstances then prevailing "). Indeed, if institutional memory had

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[8] The court also cited *Larson v. Northrop Corp.*, 21 F.3d 1164 (D.C. Cir. 1994), App. 18-19, but that case is inapt because that plan terminated more than six years before the action commenced, after which the fiduciaries owed no further duties (and could not have breached any duties), 21 F.3d at 1169.

been lost, that would provide a *compelling* reason for the current fiduciaries to perform a due diligence review to ensure that the initial selection years earlier was not based on faulty reasoning and that continuing to retain the investments otherwise remained prudent for the current plan. Merely holding a fiduciary liable for the breaches that occurred within six years, but not for those that occurred past six years, see *Boeckman*, 461 F. Supp. 2d at 814, does not threaten a fiduciary with unlimited liability for its continuing breach of duty.[9]

None of the reasons expressed by the Ninth Circuit justify its contradiction of Second and Seventh Circuit precedent or its disregard of the Secretary of Labor's settled position on the proper application of §1113(1) to this case. The Court therefore should grant a writ of certiorari to review the first question presented in this petition.

II. The Ninth Circuit's application of *Firestone* deference to fiduciary breach claims conflicts with the Second and Third Circuits and misapplies this Court's decisions in *Firestone* and *Conkright*.

The Ninth Circuit relied on *Firestone* in holding that it must defer to Respondents' interpretation of

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[9] Even the Ninth Circuit recognized this principle in a §1113(2) case. *Meagher v. Int'l Ass'n of Machinists & Aerospace Workers' Pension Plan*, 856 F.2d 1418, 1423 (9th Cir. 1988).

Plan §19.02 as allowing them to shift some of the costs of administering the Plan to the participants through revenue sharing. App. 38-43. That holding conflicts with decisions of the Second and Third Circuits, and was erroneous because *Firestone* deference does not apply to ERISA fiduciary breach actions, particularly where the fiduciaries have acted contrary to the interest of Plan participants and for the benefit of the plan sponsor.

A. *Firestone* is expressly limited to benefits claims under §1132(a)(1)(B).

In *Firestone*, the Court held that fiduciary acts in deciding a claim for plan benefits are subject to de novo review, "unless the benefit plan gives the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan." 489 U.S. at 115. The Court expressly limited its holding to benefits claims under 29 U.S.C. §1132(a)(1)(B):

> The discussion which follows is limited to the appropriate standard of review in §1132(a)(1)(B) actions challenging denials of benefits based on plan interpretations. We express no view as to the appropriate standard of review for actions under other remedial provisions of ERISA.

489 U.S. at 108. The Court has never applied *Firestone* deference to fiduciary breach actions under 29 U.S.C. §1132(a)(2). See *Metropolitan Life Ins. Co. v.*

Glenn, 554 U.S. 105 (2008); *Conkright v. Frommert*, 559 U.S. 506, 130 S.Ct. 1640 (2010).

B. For compelling reasons, the Second and Third Circuits reject *Firestone* deference in fiduciary breach actions where the fiduciaries sacrifice the interests of participants for non-beneficiaries.

The reason why *Firestone* deference does not apply to ERISA fiduciary breach actions was clearly articulated by the Second Circuit in *John Blair Communications, Inc. Profit Sharing Plan v. Telemundo Group, Inc. Profit Sharing Plan*, 26 F.3d 360 (2d Cir. 1994). Applying *Firestone* deference to fiduciary conduct

> would allow plan administrators to grant themselves broad discretion over all matters concerning plan administration, thereby eviscerating ERISA's statutory command that fiduciary decisions be held to a strict standard.

Id. at 369. Unlike in benefits claim cases under §1132(a)(1)(B), actions under §1132(a)(2) seek to enforce statutorily defined fiduciary duties that are the "highest known to the law." *Johnson*, 572 F.3d at 1082. Granting deference to a fiduciary's interpretation of its own duties "eviscerate[s]" that strict standard. *John Blair*, 26 F.3d at 369.

For similar reasons, the Third Circuit recognizes that *Firestone* deference does not apply to fiduciary

breach actions. *In re Unisys Sav. Plan Litig.*, 173 F.3d 145, 154 (3d Cir. 1999) ("the duties of loyalty and prudence demanded by ERISA should not be reviewed through an 'arbitrary and capricious' lens"; citing *Struble v. N.J. Brewery Emps. Welfare Trust Fund*, 732 F.2d 325, 333-34 (3d Cir. 1984). *Struble* explains clearly why *Firestone* deference should be limited to benefits-claim cases, and not applied to fiduciary breach claims such as the one before the Ninth Circuit:

> The use of different standards in these cases is justified by the different challenge to fiduciary loyalty that each type of action presents. In actions by individual claimants challenging the trustees' denial of benefits, the issue is not whether the trustees have sacrificed the interests of the beneficiaries as a class in favor of some third party's interests, but whether the trustees have correctly balanced the interests of present claimants against the interests of future claimants. In such circumstances it is appropriate to apply the more deferential "arbitrary and capricious" standard to the trustees' decisions. In the latter type of action, the gravamen of the plaintiff's complaint is not that the trustees have incorrectly balanced valid interests, but rather that they have sacrificed valid interests to advance the interests of non-beneficiaries.

Struble, 732 F.2d at 333-34.

Sacrificing valid interests to advance the interests of non-beneficiaries is precisely the claim here. The defendant-fiduciaries sacrificed the valid interests of Plan participants in having Edison pay all Plan administrative costs—as required by the plain language of §19.02—in favor of advancing Edison's interest in reducing its bill for administrative costs by construing §19.02 to allow shifting onto the participants administration costs through revenue sharing. The defendants did not resolve that ambiguity to "balance[] valid interests" among the participants, since no participant benefitted from shifting administrative costs from Edison onto the participants. Therefore, under Second and Third Circuit precedent, the defendants were not entitled to the *Firestone* deference that the Ninth Circuit gave them.

The Ninth Circuit believed that the Third Circuit retreated from *Struble* and "expressly disagree[d] with *John Blair*" in *Moench v. Robertson*, 62 F.3d 553 (3d Cir. 1995). *Tibble*, 711 F.3d at 1077-78. That was erroneous in both respects. First, *Moench* expressly agrees with *John Blair*'s holding that

> the arbitrary and capricious standard of review allowed in *Firestone* should not be applied mechanically to all ERISA claims, and that claims analogous to those addressed by *Struble* merit de novo review.

Id. at 565. Second, *Moench* expressly agrees with *Struble* in noting that "there exists a qualitative difference between a personal claim for benefits and a contention that an ERISA trustee failed to act in the

interest of the beneficiaries at all." *Id.* at 563. In actions concerning "a decision by an ERISA fiduciary to give a benefit to the employer rather than to the beneficiary", *Moench* holds, there can be no deferential review for the reasons given in *Struble*. *Id.* Only where there is no such conflict between beneficiaries and non-beneficiaries could *Firestone* deference even apply. *Id.* at 563-64.

Moench thus does not retreat from *Struble*; it reaffirms it. In the face of "a contention that an ERISA trustee failed to act in the interest of the beneficiaries at all", *Firestone* deference cannot apply. *Id.* at 563. That is precisely the contention in this appeal. The defendants' interpretation of Plan §19.02 to allow transferring of Plan administrative costs from Edison onto the participants certainly was not "act[ing] in the interest of the beneficiaries at all." *Moench*, 62 F.3d at 563.[10]

C. The Ninth Circuit's distinction of Second and Third Circuit precedent is not compelling and ignores the substance of that precedent.

In its amended opinion, the Ninth Circuit retreated from its attempt to distinguish *Moench* from

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[10] While *Moench* does suggest *Firestone* deference could apply to non-conflicted fiduciary breach claims, *id.* at 565-66, it did not give deference to the fiduciaries in that case, *id.* at 567-68.

John Blair and *Struble*, and instead relied on a distinction that is irrelevant. The court held that this appeal concerned a claim under §1104(a)(1)(D), whereas *Struble*, *John Blair*, and *Moench* were claims under different subparts of §1104(a)(1). App. 7-10, 38-41. In contrast to cases such as *John Blair* in which the fiduciaries are relying on their interpretation of a plan document to defend themselves from a fiduciary breach claim, the court held, an action to enforce a plan document under §1104(a)(1)(D) somehow is substantively different and merits *Firestone* deference. *Id.* at 8-10, 40-41. That distinction is meaningless, however. Nothing in the text of §1104(a)(1) or ERISA generally supports enforcing subpart (D) with less rigor than subparts (A)-(C). On the contrary, §1104(a)(1) expressly commands that a fiduciary acting "in accordance with the documents and instruments governing the plan" do so "solely in the interest of the participants and beneficiaries[.]" That does not allow, as the Ninth Circuit does, for a fiduciary to interpret plan documents in favor of the interests of the employer and against the employee-participants and certainly does not compel judicial deference to such an interpretation.

Moreover, limiting de novo review to cases where the fiduciaries rely on plan terms as a defense to §1104(a)(1)(A)-(C) breaches is unnecessary because §1104(a)(1)(D) expressly precludes such a plan document defense. Section 1104(a)(1) specifies that a fiduciary may follow plan documents only if they "are consistent with the provisions of this subchapter

[§§1101-1113]" De novo review applies to all parts of §1104(a)(1) and no exceptional deferential review should apply to part (D). Whether the claim was based on §1104(a)(1)(D) or other parts of §1104(a)(1) was not the basis for the Second and Third Circuit's refusal to apply *Firestone* deference to conflicted cases such as this and provides no support for the Ninth Circuit's contrary decision.

The Ninth Circuit altogether disregards the actual reason why the Second and Third Circuits reject *Firestone* deference in this case: the fact that the fiduciaries are interpreting a plan document in a way that advances the interests of Edison contrary to the interests of Plan participants. Instead of addressing that real distinction, the Ninth Circuit focused on a specious distinction. The Ninth Circuit disregards the very warning *John Blair* makes about applying *Firestone* deference to fiduciary breach cases: to do so allows an employer to grant its officer-fiduciaries discretionary authority to interpret their way out of a §1104(a)(1)(D) violation. That way, an employer such as Edison who appoints its executives to be plan fiduciaries could ensure the plan is always interpreted in its favor against the participants, rendering the restrictions of plan documents illusory and §1104(a)(1)(D) ineffective.

D. The Ninth Circuit's policy reasons for applying *Firestone* deference are unfounded.

The Ninth Circuit's three considerations compelling application of *Firestone* deference in this appeal are unfounded. First, there is a meaningful distinction between benefits claims and fiduciary breach actions, such that trust law principles do not apply equally to both. App. 10-11, 41-42. *Struble* and *Unisys* expressly recognize those distinctions. *Struble*, 732 F.2d at 333-34; *Unisys*, 173 F.3d at 154. So does this Court. As stated in *Firestone*, while "ERISA does not set out the appropriate standard of review for actions under §1132(a)(1)(B) challenging benefit eligibility determinations", 489 U.S. at 109, ERISA sets explicit standards that govern fiduciary conduct, 29 U.S.C. §§1101-1114, which "codif[y] and mak[e] applicable to [ERISA] fiduciaries certain principles developed in the evolution of the law of trusts", 489 U.S. at 110 (quoting H.R. Rep. No. 93-533, p. 11 (1973)).

This distinction is made throughout the statute itself. ERISA treats §1132(a)(1)(B) benefits claims much more deferentially than it treats §1132(a)(2) fiduciary breach claims. It gives State courts concurrent jurisdiction over benefits claims, but gives Federal courts exclusive jurisdiction over fiduciary breach claims. 29 U.S.C. §1132(e). It provides no limitations period for benefits claims, but imposes a Federal limitations statute for fiduciary breach claims. See *Ruppert v. Alliant Energy Cash Balance Pension Plan*, 726 F.3d 936, 941 (7th Cir. 2013)

(borrowing State limitations statute); 29 U.S.C. §1113. Benefits claims are individual claims for individual benefits. 29 U.S.C. §1132(a)(1)(B); *Struble*, 732 F.2d at 333-34. Fiduciary breach claims are representative claims on behalf of *all* plan participants seeking to enforce duties and damages owed to the *plan*. 29 U.S.C. §1132(a)(2); *In re Schering Plough Corp. ERISA Litig.*, 589 F.3d 585, 604 (3d Cir. 2009). Benefits claims are inherently administrative proceedings, requiring exhaustion of all administrative remedies provided in the plan as a condition precedent to filing suit under §1132(a)(1)(B). *Angevine v. Anheuser-Busch Cos. Pension Plan*, 646 F.3d 1034, 1037 (8th Cir. 2011). Fiduciary breach actions have no such condition precedent and are not administrative in nature. See, e.g., *Smith v. Sydnor*, 184 F.3d 356, 364-65 (4th Cir. 1999); *Horan v. Kaiser Steel Retirement Plan*, 947 F.2d 1412, 1416 n.1 (9th Cir. 1991).[11] ERISA provides only minimal standards regarding the grant or denial of benefits claims, see 29 U.S.C. §1133, but imposes significant standards and judicial enforcement of ERISA's fiduciary duties and fiduciary liability, 29 U.S.C. §§1109(a), 1132(a)(2). Thus, fiduciary breach actions are significantly different from benefits-claim actions and ERISA expressly requires greater judicial involvement in the review of fiduciary breach claims.

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[11] *Cf. Bickley v. Caremark Rx, Inc.*, 461 F.3d 1325, 1328 (11th Cir. 2006) (applying exhaustion requirement to fiduciary breach claim).

The Ninth Circuit erroneously believed that since there is no meaningful difference between benefits claims and fiduciary breach actions, the general principles of trust law recognized in *Firestone* and *Conkright* should apply equally to fiduciary breach actions. App. 10-11, 41-42. The court, however, disregarded an important principle of trust law quoted in *Firestone*:

> The extent of the duties and powers of a trustee is determined by the rules of law that are applicable to the situation, and not the rules that the trustee or his attorney believes to be applicable, and by the terms of the trust *as the court may interpret them*, and not as they may be interpreted by the trustee himself or by his attorney.

Firestone, 489 U.S. at 112 (quoting 3 W. Fratcher, Scott on Trusts § 201, at 221 (4th ed. 1988)). The Ninth Circuit, to the contrary, allows the trustees to interpret their own trust terms, contrary to this common law principle. Adopting the Ninth Circuit's reasoning impermissibly "would require us to impose a standard of review that would afford less protection to employees and their beneficiaries than they enjoyed before ERISA was enacted." *Firestone*, 489 U.S. at 113-14.

The Ninth Circuit also found compelling the policy considerations expressed in *Conkright* of the need for efficiency, predictability, and uniformity in the interpretation of plan benefit formulas. App. 11, 42-43 (citing *Conkright*, 130 S.Ct. at 1649-50). Those

policy considerations do not apply in this case. *Conkright* concerned Xerox Corporation's pension plan and how to calculate benefits for employees who had retired previously and received lump-sum benefits distributions. 130 S.Ct. at 1644-45. The Court found *Firestone* deference to promote efficiency, predictability, and uniformity in benefits claim decisions because it moved those decisions from the courts to internal administrative proceedings, removed the courts from deciding complicated benefits formulas that could have far-reaching unintended consequence (including plan insolvency), and ensured a single decision maker applied a uniform interpretation for all benefits claims instead of various courts applying conflicting interpretations in various individual benefits claims. *Id.*

None of those policy considerations apply here. As noted above, ERISA requires judicial review of fiduciary conduct in light of its strict fiduciary standards. Fiduciary breach actions are not administrative proceedings. Therefore, deference is not required to make administrative proceedings non-litigious and more efficient. Section 1132(a)(2) actions are actions on behalf of the Plan, not individual participants; this action was a class action on behalf of all Plan participants. The court's de novo interpretation of Plan §19.02 thus would apply to the Plan as a whole for all participants; there could be no conflicting interpretations of §19.02 by different courts. Moreover, interpretation of Plan §19.02 is a simple matter that did not affect what benefits other participants might

receive and did not have far-reaching consequences such as rendering the Plan insolvent. In contrast, the benefits determination in *Conkright* required actuarial expertise and could have affected the plan's solvency. *Id.* at 1649-50. Therefore, *Firestone* deference is not required in this case to provide for uniformity or predictability in fiduciary breach actions.

None of the reasons proffered by the Ninth Circuit justify its conflict with the Second and Third Circuits in applying *Firestone* deference to fiduciary breach actions, particularly where the fiduciaries interpret plan terms in favor of the employer's interests against the participants' interests. The Court therefore should grant certiorari on the second question presented to resolve this Circuit split and confirm that *Firestone* deference does not apply in this case.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

GLENN TIBBLE; WILLIAM BAUER; WILLIAM IZRAL; HENRY RUNOWIECKI; FREDERICK SUHADOLC; HUGH TINMAN, JR., as representatives of a class of similarly situated persons, and on behalf of the Plan,

Plaintiffs-Appellants,

v.

EDISON INTERNATIONAL; THE EDISON INTERNATIONAL BENEFITS COMMITTEE, FKA The Southern California Edison Benefits Committee; EDISON INTERNATIONAL TRUST INVESTMENT COMMITTEE; SECRETARY OF THE EDISON INTERNATIONAL BENEFITS COMMITTEE; SOUTHERN CALIFORNIA EDISON'S VICE PRESIDENT OF HUMAN RESOURCES; MANAGER OF SOUTHERN CALIFORNIA EDISON'S HR SERVICE CENTER,

Defendants-Appellees.

No. 10-56406

D.C. No. 2:07-cv-05359-SVW-AGR

GLENN TIBBLE; WILLIAM BAUER; WILLIAM IZRAL; HENRY RUNOWIECKI; FREDERICK SUHADOLC; HUGH TINMAN, JR., as representatives of a class of similarly situated persons, and on behalf of the Plan,

Plaintiffs-Appellees,

v.

EDISON INTERNATIONAL; THE SOUTHERN CALIFORNIA EDISON BENEFITS COMMITTEE, incorrectly named The Edison International Benefits Committee; EDISON INTERNATIONAL TRUST INVESTMENT COMMITTEE; SECRETARY OF THE SOUTHERN CALIFORNIA EDISON COMPANY BENEFITS COMMITTEE, incorrectly named Secretary of the Edison International Benefits Committee; SOUTHERN CALIFORNIA EDISON'S VICE PRESIDENT OF HUMAN RESOURCES; MANAGER OF SOUTHERN CALIFORNIA EDISON'S HR SERVICE CENTER,

Defendants-Appellants.

No. 10-56415

D.C. No. 2:07-cv-05359-SVW-AGR

ORDER AND AMENDED OPINION

Appeal from the United States District Court for the Central District of California Stephen V. Wilson, District Judge, Presiding

Argued and Submitted
November 6, 2012 – Pasadena, California

Filed March 21, 2013
Amended August 1, 2013

Before: Alfred T. Goodwin, and
Diarmuid F. O'Scannlain, Circuit Judges, and
Jack Zouhary, District Judge.*

Order:
Opinion by Judge O'Scannlain

SUMMARY**

ERISA

The panel affirmed the district court's judgment in a class action brought under the Employee Retirement Income Security Act by beneficiaries who alleged that their pension plan was managed imprudently and in a self-interested fashion.

Rejecting a continuing violation theory, the panel held that under ERISA's six-year statute of limitations, the district court correctly measured the timeliness of claims alleging imprudence in plan design from when the decision to include those investments

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* The Honorable Jack Zouhary, United States District Judge for the Northern District of Ohio, sitting by designation.

** This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

in the plan was initially made. The panel held that the beneficiaries did not have actual knowledge of conduct concerning retail-class mutual funds, and so the three-year statute of limitations set forth in ERISA § 413(2) did not apply.

The panel held that ERISA § 404(c), a safe harbor that can apply to a pension plan that "provides for individual accounts and permits a participant or beneficiary to exercise control over the assets in his account," did not apply. Disagreeing with the Fifth Circuit, the panel applied *Chevron* deference to the Department of Labor's final rule interpreting § 404(c).

The panel declined to consider for the first time on appeal defendants' arguments concerning class certification.

The panel affirmed the district court's grant of summary judgment to defendants on the beneficiaries' claim that revenue sharing between mutual funds and the administrative service provider violated the pension plan's governing document and was a conflict of interest. Agreeing with the Third and Sixth Circuits, and disagreeing with the Second Circuit, the panel held that, as in cases challenging denials of benefits, and abuse of discretion standard of review applied in this fiduciary duty and conflict-of-interest suit because the plan granted interpretive authority to the administrator.

The panel held that the defendants did not violate their duty of prudence under ERISA by including in the plan menu mutual funds, a short-term

investment fund akin to a money market, and a unitized fund for employees' investment in the company's stock.

The panel affirmed the district court's holding, after a bench trial, that the defendants were imprudent in deciding to include retail-class shares of three specific mutual funds in the plan menu because they failed to investigate the possibility of institutional-share class of alternatives.

COUNSEL

Michael A. Wolff, Schlichter, Bogard & Denton, LLP, St. Louis, MO, argued the cause and filed the briefs for the plaintiffs-appellants. With him on the briefs were Jerome J. Schlichter, Nelson G. Wolff, and Jason P. Kelly, Schlichter, Bogard & Denton, LLP, St. Louis, MO.

Jonathan D. Hacker, O'Melveny & Myers LLP, Washington, DC, argued the cause and filed the briefs for the defendants-appellees/cross-appellants. With him on the briefs were Walter Dellinger, Robert N. Eccles, Gary S. Tell, O'Melveny & Myers LLP, Washington, D.C., as well as Matthew Eastus, and China Rosas, O'Melveny & Myers LLP, Los Angeles, CA.

Elizabeth Hopkins, U.S. Department of Labor, Washington, DC, argued the cause and filed the brief for the Secretary of Labor as amicus curiae in support of plaintiffs-appellants. With her on the brief were

Stacey E. Elias, M. Patricia Smith, and Timothy D. Hauser.

Jay E. Sushelsky, AARP Foundation Litigation, Washington, DC, filed the brief for the AARP as amicus curiae in support of plaintiffs-appellants. With him on the brief was Melvin Radowitz, AARP, Washington, D.C.

Nicole A. Diller, Alison B. Willard, and Abbey M. Glenn, Morgan, Lewis & Bockius LLP, San Francisco, CA, filed the brief for the California Employment Law Council as amicus curiae in support of defendants-appellees/cross-appellants.

Thomas L. Cubbage III, Covington & Burling LLP, Washington, DC, filed the brief for the Investment Company Institute as amicus curiae in support of defendants-appellees/ cross-appellants. With him on the brief was S. Michael Chittenden, Covington & Burling LLP, Washington, DC.

ORDER

I

The opinion filed March 21, 2013, and published at 711 F.3d 1061, is amended as follows:

Beginning on slip opinion page 28 delete the text from <At least one court has held that in cases implicating ERISA § 404 fiduciary duties,> through slip opinion 31 <difficulties with *John Blair* impel us to

apply *Firestone,* and so we do.>. In place of the deletion substitute the following:

<The Second Circuit has declined to apply the arbitrary and capricious standard from *Firestone* outside of the benefits context. *See John Blair Commc'ns, Inc. Profit Sharing Plan v. Telemundo Grp., Inc. Profit Sharing Plan,* 26 F.3d 360, 369-70 (2d Cir. 1994). Other circuits have read *Firestone* more broadly, stating that its deference can reach beyond ERISA actions that arise under section 1132(a)(1). *See, e.g., Hunter v. Caliber Sys., Inc.,* 220 F.3d 702, 711 (6th Cir. 2000) ("[W]e find no barrier to application of the arbitrary and capricious standard in a case such as this not involving a typical review of denial of benefits."); *Moench v. Robertson,* 62 F.3d 553, 565 (3d Cir. 1995) ("[W]e believe that after *Firestone,* trust law should guide the standard of review over claims, such as those here, not only under section 1132(a)(1)(B) but also over claims filed pursuant to 29 U.S.C. § 1132(a)(2) based on violations of the fiduciary duties set forth in [ERISA § 404].").

In relevant part, *John Blair* involved a challenge under ERISA § 404 to how assets had been allocated. 26 F.3d at 370. The plaintiffs argued that the defendant had breached its fiduciary duty by retaining surplus income generated by virtue of a lag between when plan members elected to move assets and the actual transfer of the funds. *Id.* at 362, 368. As a defense, the fiduciary argued that the terms of the Plan authorized it to allocate the assets as it had, and that because the Plan "gave the plan committee

discretion to interpret the provisions of the [P]lan" the court was bound to approve of its allocation unless it determined that the decision to do so had been "arbitrary and capricious" under *Firestone*. *Id.* at 369.

Rejecting that framework, the Second Circuit instead decided to evaluate the claim under the "prudent person standard articulated in § 404 of ERISA." *Id.* As support for this approach, the court cited a pre-*Firestone* authority from the Third Circuit and a pair of district court decisions from within the Second Circuit. *See Struble v. N.J. Brewery Emps. Welfare Trust Fund*, 732 F.2d 325, 333-34 (3d Cir. 1984); *Ches v. Archer*, 827 F. Supp. 159, 165-66 (W.D.N.Y. 1993); *Trapani v. Consol. Edison Emps.' Mut. Aid Soc'y, Inc.*, 693 F. Supp. 1509, 1515 (S.D.N.Y. 1988). Relying on *John Blair* and *Struble*, beneficiaries argue that their claim is similarly exempt from *Firestone*. We disagree.

As noted above, this specific challenge by beneficiaries has been brought under 29 U.S.C. § 1104(a)(1)(D), which is part of ERISA § 404. *See Tibble*, 639 F. Supp. 2d at 1096 (explaining that beneficiaries "move[d] for summary judgment on the basis that [Edison] violated the terms of the Plan by failing to pay the full extent of Hewitt's recordkeeping costs"). While subsection (a)(1)(B) codifies the statutory prudent-person standard, subsection (a)(1)(D) simply requires that actions be in line with the plan documents. *See* 29 U.S.C. § 1104(a)(1). *John Blair* was an attempt by a fiduciary to escape from otherwise applicable duties on the basis of a plan interpretation.

The Second Circuit declined to apply *Firestone* deference because of a concern about bootstrapping. *See John Blair,* 26 F.3d at 369. Similarly, the district court decisions it favorably cited were examples of fiduciaries trying to weaken or evade the statutory standard of prudence. *See Ches,* 827 F. Supp. at 165 (rejecting defendants' argument that "they cannot be found to have breached their fiduciary duties in the absence of an allegation and a showing that their determinations had been arbitrary and capricious"); *Trapani,* 693 F. Supp. at 1514 ("Defendants argue that the court must apply an arbitrary and capricious standard, rather than the prudent man standard specifically set forth in the statute.").[1]

Edison is not making any such argument here, as beneficiaries have not pursued this challenge as a violation of the prudent person standard; instead, their contention rises or falls exclusively on what

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[1] The *Struble* case is even farther afield; in relevant part, it did not concern an issue of plan interpretation at all. *See* 732 F.2d at 331-35. Arising during a period of lower court uncertainty about the proper standard(s) of review under ERISA, *see de Nobel v. Vitro Corp.*, 885 F.2d 1180, 1184-85 (4th Cir. 1989), *Struble* involved a claim that the employer trustee had breached its duties of care and loyalty by "failing to collect the amount of Employer contributions allegedly required by the Employers' respective bargaining agreements." 732 F.2d at 331. The Third Circuit decided to apply "the standards set forth explicitly in ERISA" rather than the arbitrary and capricious standard. *Id.* at 333.

Plan section 19.02 allows.[2] As to issues of plan interpretation that do not implicate ERISA's statutory duties, they are subject to *Firestone*.

At least three considerations prompt us to hold that the *Firestone* framework can govern issues of plan interpretation even when they arise outside the benefits context. First, while the *Firestone* case did not announce a holding beyond benefits, its rationale did *not* stem from an interpretive gloss on the welfare-benefits provision of ERISA. *See* 489 U.S. at 108, 109 ("ERISA does not set out the appropriate standard of review for actions under § 1132(a)(1)(B) challenging benefit eligibility determinations."). Instead, because "ERISA abounds with the language and terminology of trust law" and because of legislative history to that effect, that body of law – not a discrete provision – dictated "the appropriate standard of review." *Id.* at 110-11 ("Trust principles make a deferential standard of review appropriate when a trustee exercises discretionary powers."). The law of trusts was the basis for the dual-track standard whereby, absent a contrary designation, de novo review applies. *See id.* at 111. The Supreme Court's most recent analysis of *Firestone* reenforces that the deference

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[2] We thus leave for another day what judicial-review standard would apply in a case like *John Blair* where the Plan is said to authorize what the statutory duties codified in ERISA forbid. Next, in Part V.B of the opinion, we explain why these beneficiaries' claim that revenue sharing was a conflict of interest under ERISA § 406 fails.

underlying that case is a product of what trust law has to say about matters of interpretation. *See Conkright*, 130 S. Ct. at 1646 ("[U]nder trust law, the proper standard of review of a trustee's decision depends on the language of the instrument creating the trust. If the trust documents give the trustee power to construe disputed or doubtful terms, the trustee's interpretation will not be disturbed if reasonable." (alterations in original) (internal citation and quotation marks omitted)).

Second, one reason the Court in *Conkright* rejected an exception the Second Circuit had carved out from *Firestone* deference was its potential to create "uniformity problems." 130 S. Ct. at 1650. The concern was that if de novo review sometimes applied, fiduciaries would be in the "impossible situation" of being subject to different plan interpretations by courts depending on the particular facts of the cases where the interpretive issue had arisen. *Id.* Not applying *Firestone* deference in this case would risk similar difficulties, as parts of a plan could be assigned one meaning when litigated under section 1132(a)(1)(B) and another meaning when litigated, like here, under section 1104(a)(1)(D).

Third, we observe that consistently applying *Firestone* to the question of what a plan means, "by permitting an employer to grant primary interpretive authority over an ERISA plan to the plan administrator," has the virtue of "preserv[ing] the 'careful balancing' on which ERISA is based." *Id.* at 1649. In particular, it helps keep administrative and litigation

expenses under control, which otherwise could "discourage employers from offering [ERISA] plans in the first place." *Id.* (alteration in original).>.

An amended opinion is filed concurrently with this order.

II

With these amendments, the panel has voted unanimously to deny the petition for rehearing. Judge O'Scannlain has voted to deny the petition for rehearing en banc, and Judges Goodwin and Zouhary have so recommended.

The full court has been advised of the petition for rehearing en banc, and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35. The petition for rehearing and petition for rehearing en banc is **DENIED**.

No further petitions for panel rehearing or for rehearing en banc will be entertained.

OPINION

O'SCANNLAIN, Circuit Judge:

Current and former beneficiaries sued their employer's benefit plan administrator under the Employee Retirement Income Security Act charging that their pension plan had been managed imprudently and in a self-interested fashion. We must decide, among other issues, whether the Act's limitations

period or its safe harbor provision are obstacles to their suit.

I

A

Edison International is a holding company for various electric utilities and other energy interests including Southern California Edison Company and the Edison Mission Group (collectively "Edison"), which itself consists of the Chicago-based Midwest Generation. Like most employer-organizations offering pensions today, Edison sponsors a 401(k) retirement plan for its workforce. During litigation, the total valuation of the "Edison 401(k) Savings Plan" was $3.8 billion, and it served approximately 20,000 employee-beneficiaries across the entire Edison International workforce. Unlike the guaranteed benefit pension plans of yesteryear, this kind of defined-contribution plan entitles retirees only to the value of their own individual investment accounts. *See* 29 U.S.C. § 1002(34). That value is a function of the inputs, here a portion of the employee's salary and a partial match by Edison, as well as of the market performance of the investments selected.

To assist their decision making, Edison employees are provided a menu of possible investment options. Originally they had six choices. In response to a study and union negotiations, in 1999 the Plan grew to contain ten institutional or commingled pools, forty mutual fund-type investments, and an indirect

investment in Edison stock known as a unitized fund. The mutual funds were similar to those offered to the general investing public, so-called retail-class mutual funds, which had higher administrative fees than alternatives available only to institutional investors. The addition of a wider array of mutual funds also introduced a practice known as revenue sharing into the mix. Under this, certain mutual funds collected fees out of fund assets and disbursed them to the Plan's service provider. Edison, in turn, received a credit on its invoices from that provider.

Past and present Midwest Generation employees Glenn Tibble, William Bauer, William Izral, Henry Runowiecki, Frederick Suhadolc, and Hugh Tinman, Jr. ("beneficiaries") sued under the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1001, *et seq.*, which governs the 401(k) Plan, and obtained certification as a class action representing the whole of Edison's eligible workforce.[1] Beneficiaries objected to the inclusion of the retail-class mutual funds, specifically claiming that their inclusion had been imprudent, and that the practice of revenue sharing had violated both the Plan document and a conflict-of-interest provision. Beneficiaries also claimed that offering a unitized stock fund, money market-style investments, and mutual funds, had been imprudent.

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[1] As discussed *infra* Part IV, we express no opinion in this case on whether beneficiaries' suit was properly cognizable as a class action.

B

The district court granted summary judgment to Edison on virtually all these claims. *See Tibble v. Edison Int'l,* 639 F. Supp. 2d 1074 (C.D. Cal. 2009). The court also determined that ERISA's limitations period barred recovery for claims arising out of investments included in the Plan more than six years before beneficiaries had initiated suit. *Id.* at 1086; *see* 29 U.S.C. § 1113(1)(A).

Remaining for trial after these rulings was beneficiaries' claim that the inclusion of specific retail-class mutual funds had been imprudent. Without retreating from an earlier decision – at summary judgment – that retail mutual funds were not categorically imprudent, the court agreed with beneficiaries that Edison had been imprudent in failing to investigate the possibility of institutional-class alternatives. *See Tibble v. Edison Int'l,* No. CV 07-5359, 2010 WL 2757153, at *30 (C.D.Cal. July 8, 2010). It awarded damages of $370,000.

Beneficiaries timely appeal the district court's partial grant of summary judgment to Edison.[2] Edison timely cross appeals, chiefly contesting the post-trial judgment.

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[2] In a separately filed memorandum disposition, we addressed beneficiaries' appeal from the district court's decision not to award fees or costs to either party. *See Tibble, et al. v. Edison Int'l.*, No. 11-56628, 2013 WL 1150788 (9th Cir. Mar. 21, 2013).

II

Beneficiaries' first contention on appeal is that the district court incorrectly applied ERISA's six-year limitations period to bar certain of their claims. Edison argues for application of the shorter three-year period. We reject both parties' approaches to timeliness.

A

For claims of fiduciary breach, ERISA § 413 provides that no action may be commenced "after the earlier of":

> (1) six years after (A) the date of the last action which constituted a part of the breach or violation, or (B) in the case of an omission the latest date on which the fiduciary could have cured the breach or violation, or
>
> (2) three years after the earliest date on which the plaintiff had actual knowledge of the breach or violation;
>
> except that in the case of fraud or concealment, such action may be commenced not later than six years after the date of discovery of such breach or violation.

29 U.S.C. § 1113.

B

1

Beneficiaries argue that the court erred by measuring the timeliness under ERISA § 413(1) for claims alleging imprudence in plan design from when the decision to include those investments in the Plan was initially made. They are joined in this contention by the United States Department of Labor ("DOL"). Because fiduciary duties are ongoing, and because section 413(1)(A) speaks of the "*last* action" that constitutes the breach, these claims are said to be timely for as long as the underlying investments remain in the plan. Essentially, they argue that we should either equitably engraft onto, or discern from the text of section 413 a "continuing violation theory."

Beneficiaries' argument, though, would make hash out of ERISA's limitation period and lead to an unworkable result. We have previously declined to read the section 413(2) actual-knowledge provision as permitting the maintenance of the status-quo, absent a new breach, to restart the limitations period under the banner of a "continuing violation." *Phillips v. Alaska Hotel & Rest. Emps. Pension Fund,* 944 F.2d 509, 520 (9th Cir. 1991). In *Phillips,* the controlling opinion did not reach whether the same was true for section 413(1)(A). 944 F.2d at 520-21. Today we hold that the act of designating an investment for inclusion starts the six-year period under section 413(1)(A) for claims asserting imprudence in the design of the plan menu.

Preliminarily, we observe that in the case of omissions the statute already embodies what the beneficiaries urge for the last action. Section 413(1)(B) ties the limitations period to "the latest date on which the fiduciary could have cured the breach or violation." Importing the concept into (1)(A), then, would render (1)(B) surplusage. This must be avoided when, as here, distinct meanings can be discerned from statutory parts. *See Freeman v. Quicken Loans, Inc.*, 132 S. Ct. 2034, 2043 (2012).

Second, beneficiaries' logic "confuse[s] the failure to *remedy* the alleged breach of an obligation, with the commission of an alleged *second* breach, which, as an overt act of its own recommences the limitations period." *Phillips*, 944 F.2d at 523 (O'Scannlain, J., concurring). Characterizing the mere continued offering of a plan option, without more, as a subsequent breach would render section 413(1)(A) "meaningless and [could even] expose present Plan fiduciaries to liability for decisions made by their predecessors – decisions which may have been made decades before and as to which institutional memory may no longer exist." *David v. Alphin*, 817 F. Supp. 2d 764, 777 (W.D.N.C. 2011), *aff'd*, 704 F.3d 327, 342-43 (4th Cir. 2013). We decline to proceed down that path. As with the application of any statute of limitations, we recognize that injustices can be imagined, but section 413(1) "suggests a judgment by Congress that when six years has passed after a breach or violation, and no fraud or concealment occurs, the value of repose will trump other interests, such as a plaintiff's

right to seek a remedy." *Larson v. Northrop Corp.*, 21 F.3d 1164, 1172 (D.C. Cir. 1994).

Finally, we are unpersuaded by DOL's suggestion that our holding will give ERISA fiduciaries carte blanche to leave imprudent plan menus in place. The district court allowed beneficiaries to put on evidence that significant changes in conditions occurred within the limitations period that should have prompted "a full due diligence review of the funds, equivalent to the diligence review Defendants conduct when adding new funds to the Plan." These particular beneficiaries could not establish changed circumstances engendering a new breach, but the district court was entirely correct to have entertained that possibility. *See, e.g., Quan v. Computer Scis. Corp.*, 623 F.3d 870, 878-79 (9th Cir. 2010) (explaining that "fiduciaries are required to act 'prudently' when determining whether or not to invest, or continue to invest"). The potential for future beneficiaries to succeed in making that showing illustrates why our interpretation of section 413(1)(A) will not alter the duty of fiduciaries to exercise prudence on an ongoing basis.

2

For its part, Edison contends that beneficiaries had actual knowledge of conduct concerning retail-class mutual funds, triggering ERISA § 413(2), more

than three years before August 16, 2007, when the complaint was filed.[3]

In order to apply ERISA's limitation periods, the court "must first isolate and define the underlying violation." *Ziegler v. Conn. Gen. Life Ins. Co.*, 916 F.2d 548, 550-51 (9th Cir. 1990). Here, as we explore in greater detail below,[4] the crux of beneficiaries' successful theory of liability at trial was that alternatives to retail shares had not been investigated – not simply that their inclusion had been imprudent. Second, specific to section 413(2), the court must inquire as to when the plaintiffs had actual knowledge of that violation or breach. *Id.* at 552. Edison points to Summary Plan Descriptions provided to all participants, as well as to mutual fund prospectuses furnished to investors, claiming that these materials made the inclusion of retail shares known. Similar information was also furnished to the unions during negotiations.

But as the nature of the breach makes apparent, Edison is citing evidence of the wrong type of knowledge. When beneficiaries claim "the fiduciary made an *imprudent* investment, actual knowledge of the breach [will] usually require some knowledge of how

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[3] We consider this argument only as it affects the post-trial verdict. This is so because, as Edison clarified in its reply brief, this is the extent of its contention, and because our decision to affirm the grant of summary judgment on beneficiaries' other claims makes a broader ruling unnecessary.

[4] *See infra* Part VII.

the fiduciary selected the investment." *Brown v. Am. Life Holdings, Inc.*, 190 F.3d 856, 859 (8th Cir. 1999). For example, in *Waller v. Blue Cross of California*, we explained that the three-year ERISA limitations period did not run from the time when the plaintiffs had purchased the subject annuities because their theory of breach was that the fiduciaries had "unlawfully employ[ed] an infirm bidding process" to acquire such annuities. 32 F.3d 1337, 1339, 1341 (9th Cir. 1994); *see also Frommert v. Conkright*, 433 F.3d 254, 272 (2d Cir. 2006) ("The flaw with the district court's conclusion [under section 413(2)] is that the plaintiffs' claim for breach of fiduciary duty is not premised solely on the defendants' adoption of the phantom account; rather, it is based on allegations that the defendants made ongoing misrepresentations about the origins of the phantom account in an effort to justify its usage.").

Therefore, because these beneficiaries' trial claims hinged on infirmities in the selection process for investments, we hold that mere notification that retail funds were in the Plan menu falls short of providing "actual knowledge of the breach or violation." § 413(2).

III

On its cross appeal, Edison claims that beneficiaries' entire case is proscribed by ERISA § 404(c), a safe harbor that can apply to a pension plan that "provides for individual accounts and permits a

participant or beneficiary to exercise control over the assets in his account." 29 U.S.C. § 1104(c)(1)(A).

As the Edison 401(k) is clearly such a plan we consider the terms of section 404(c). It provides that:

> [N]o person who is otherwise a fiduciary shall be liable under this part for any loss, or by reason of any breach, which results from such participant's or beneficiary's exercise of control.

Id. § 1104(c)(1)(A)(ii).

Edison reads this statutory language as insulating it from all of beneficiaries' claims because each challenged investment was a product of a "participant's or beneficiary's exercise of control," by virtue of his selection of it from the Plan menu. Disagreeing, the DOL directs us to its previously announced interpretations. In a 1992 regulation it stated that in order to fall within section 404's ambit, the breach or loss would need to be the "direct and necessary result" of the action by the beneficiary. 29 C.F.R. § 2550.404c-1(d)(2). A preamble that went through the notice-and-comment process and appeared in the agency's final rule, stated that "the act of limiting or designating investment options which are intended to constitute all or part of the investment universe of an ERISA section 404(c) plan is a fiduciary function which is not a direct or necessary result of any participant direction." 57 Fed. Reg. 46,922, 46,924 n.27 (Oct. 13, 1992).

To "reiterate its long held position," 73 Fed. Reg. 43,014, 43,018 (July 23, 2008), DOL recently codified this guidance in the body of a new regulation so that it now appears in the Code of Federal Regulations, rather than in the preamble to a rule.[5] *See* 75 Fed. Reg. 64,910, 64,946 (Oct. 20, 2010) (codified at 29 C.F.R. pt. 2550) (Section 404(c) "does not serve to relieve a fiduciary from its duty to prudently select and monitor any service provider or designated investment alternative offered under the plan"). This amended regulation, however, was not in effect during the time period at issue in this case.[6] Our inquiry therefore centers on what appeared in the 1992 final rule.

As to these earlier materials, the parties and amici join issue on the status this court should accord them. Beneficiaries and DOL argue that they are entitled to the robust sort of administrative-law deference dictated by *Chevron, U.S.A., Inc. v. Natural Resource Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984). Edison claims that a preamble is not the type of material to which courts properly defer. In any event, the California Employment Law Council, as

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[5] Final rules are published in their entirety in the Federal Register but, by convention, their preambles are left out of the Code of Federal Regulations. *See Langbecker v. Elec. Data Sys. Corp.*, 476 F.3d 299, 310 n.22 (5th Cir. 2007).

[6] *See id.* at 64,910 ("Notwithstanding the effective date, the final rule and amendments will apply to individual account plans for plan years beginning on or after November 1, 2011.").

amicus for Edison, argues that DOL's interpretation is an impermissible construction of the statute. *See id.* ("If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."). Both Edison and the Employment Council rely on a divided opinion from the Fifth Circuit, and on an older case from the Third Circuit in which the alleged violations preceded the effective date of even the 1992 rule. *See Langbecker v. Elec. Data Sys. Corp.*, 476 F.3d 299, 310-12 (5th Cir. 2007); *In re Unisys Sav. Plan Litig.*, 74 F.3d 420, 444-48 & n.21 (3d Cir. 1996).

Several other circuits, by contrast, have accepted the position advocated by DOL. *See, e.g., Pfeil v. State St. Bank & Trust Co.*, 671 F.3d 585, 599-600 (6th Cir. 2012) (favoring DOL's position in its "amicus curiae brief in this appeal and with the preamble to the regulations implementing the safe harbor"), *cert. denied*, 133 S. Ct. 758 (2012); *Howell v. Motorola, Inc.*, 633 F.3d 552, 567 (7th Cir. 2011) (similar); *DiFelice v. U.S. Airways, Inc.*, 497 F.3d 410, 418 n.3 (4th Cir. 2007) (implicitly deferring to the 1992 rulemaking).

A

The *Chevron* framework can apply only if two initial conditions are met: (1) Congress has delegated the power to that agency to pronounce rules that carry the force of law and (2) the interpretation for which deference is sought was rendered pursuant to

that authority. *Price v. Stevedoring Servs. of Am., Inc.*, 697 F.3d 820, 833 (9th Cir. 2012) (en banc). That was the teaching of *United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001).

Congress gave the Secretary of Labor authority to promulgate binding regulations interpreting Title I of ERISA, which includes section 404(c). 29 U.S.C. § 1135. It also empowered the Secretary to bring civil enforcement actions. *Id.* § 1132(a)(2). These charges plainly satisfy the first requirement under *Mead*. *See, e.g., Gonzales v. Oregon*, 546 U.S. 243, 258 (2006) (explaining that "[i]n many cases authority is clear because the statute gives an agency broad power to enforce" its provisions). As for *Mead*'s second consideration, we do not view the fact that the interpretation appears in a final rule's preamble as disqualifying it from *Chevron* deference. Edison cites nothing authoritative for cabining that doctrine to materials destined for the pages of the Code of Federal Regulations. Though not a necessary condition, a notice-and-comment rule is virtually assured eligibility for *Chevron* deference. *See, e.g., Mead*, 533 U.S. at 230-31; *Renee v. Duncan*, 686 F.3d 1002, 1011 (9th Cir. 2012). Additionally, other factors significant to whether deference is owed are present here. DOL has expressed its position for two decades, ERISA is "an enormously complex and detailed statute," *Conkright v. Frommert*, 130 S. Ct. 1640, 1644 (2010), and this

question is of central import to its administration. *See Barnhart v. Walton*, 535 U.S. 212, 222 (2002).[7]

B

Because the 1992 interpretation clears the *Mead* threshold, we proceed to the well-trod *Chevron* inquiry.[8] This calls on the court to examine the plain meaning of the text and apply other relevant canons of statutory interpretation to ascertain whether Congress had a fixed "intention on the precise question at issue" that the agency must abide. *Wilderness Soc'y v. U.S. Fish & Wildlife Serv.*, 353 F.3d 1051, 1060 (9th Cir. 2003) (en banc).

If so, "that intention is the law and must be given effect." *Id.* If not, the court defers to the agency, provided that its interpretation is not "arbitrary, capricious, or manifestly contrary to the statute." *Id.* at 1059; *see also Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 980 (2005) (explaining

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[7] *Cf. Stern v. IBM Corp.*, 326 F.3d 1367, 1371-72 (11th Cir. 2003) (commenting that the "views of the agency entrusted with interpreting and enforcing ERISA carry considerable weight").

[8] No party or amicus has invoked *Auer* deference, which governs agency interpretations of its "own ambiguous regulation." *Gonzales*, 546 U.S. at 255. To qualify for that, the DOL would need to show ambiguity and would need to demonstrate that its regulation, which added the modifier "direct or necessary," more than parroted or "paraphrase[d] the statutory language." *Id.* at 257; *see Langbecker*, 476 F.3d at 310 n.22 (questioning the presence of ambiguity in the 1992 regulation).

that "ambiguities in statutes within an agency's jurisdiction to administer are delegations of authority to the agency to fill the statutory gap in reasonable fashion"). These inquiries can be pursued in two steps, or all at once. *Compare Wilderness Soc'y*, 353 F.3d at 1059, *with Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208, 218 n.4 (2009) (embracing single-step analysis because "if Congress has directly spoken to an issue then any agency interpretation contradicting what Congress has said would be unreasonable").

In *Langbecker*, the Fifth Circuit concluded that the DOL's interpretation of section 404(c) could not receive *Chevron* deference "because it contradicts the governing statutory language." 476 F.3d at 311. Respectfully, we disagree. Section 404(c) speaks of "any breach, which results from" a participant's exercise of control. "Result from" means "[t]o arise as a consequence, effect, or outcome of some action." Oxford English Dictionary (3d ed. 2010); *see Wilderness Soc'y*, 353 F.3d at 1060 ("[A] fundamental canon of construction provides that unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning." (internal quotation marks omitted)).

Thus as cogently explained by DOL in its brief, "the selection of the particular funds to include and retain as investment options in a retirement plan is the responsibility of the plan's fiduciaries, and logically precedes (and thus cannot 'result[ ] from') a participant's decision to invest in any particular option." As previously noted, the DOL expressed the

same position in a notice-and-comment rule – albeit less succinctly. The preamble to the 1992 final rule states

> that the act of limiting or designating investment options which are intended to constitute all or part of the investment universe of an ERISA 404(c) plan is a fiduciary function which, whether achieved through fiduciary designation or express plan language, is not a *direct or necessary* result of any participant direction of such plan. Thus, for example, in the case of look-through investment vehicles, the plan fiduciary has a fiduciary obligation to prudently select such vehicles, as well as a residual fiduciary obligation to periodically evaluate the performance of such vehicles to determine, based on that evaluation, whether the vehicles should continue to be available as participant investment options. Similar fiduciary obligations would exist in the case of an investment universe consisting of investment alternatives which are not look-through investment vehicles but which are specifically designated by plan fiduciaries.

57 Fed. Reg. at 46,924 n.27 (emphasis added). Although this rule invokes the regulatory terms "direct and necessary," 29 C.F.R. § 2550.404c-1(d)(2), the agency's ability to make the same point in its amicus brief and in the new 2010 rule without that terminology suggests that this gloss may not be essential. *See Langbecker,* 476 F.3d at 311. In our view, though,

this does not diminish the validity of its interpretation.

In an opinion that has been read by some to support the no-deference view, the Third Circuit keyed in on the fact that section 404(c) also speaks of "any loss" resulting from a participant's control. *In re Unisys*, 74 F.3d at 445.[9] For a 401(k) (or for any defined-contribution plan for that matter), it is admittedly the case that monetary damage flowing from a fiduciary's imprudent design of the investment menu passes through the participant, as intermediary. But is it proper to conclude that those losses, in the language of section 404(c), "result from" the participant's choice? This might seem an odd question given that, literally speaking, there can be no loss without the participant selecting an investment.

But, "[i]njuries have countless causes, and not all should give rise to legal liability." *CSX Transp., Inc. v. McBride*, 131 S. Ct. 2630, 2637 (2011). Undoubtedly, in these situations, a fiduciary's decision to include an investment option on the plan menu also is a cause of any participant's loss. Confronted with this difficulty,

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[9] Since then, that court has indicated that it may, in the appropriate case, reconsider its decision in order to reflect the possibility that *Chevron* deference is now owed to the DOL's interpretation. *Renfro v. Unisys Corp.*, 671 F.3d 314, 328-29 (3d Cir. 2011); *see also Langbecker*, 476 F.3d at 322 (Reavley, J., dissenting) (suggesting that the earlier *Unisys* case may no longer be good law); *DiFelice v. U.S. Airways, Inc.*, 404 F. Supp. 2d 907, 909 (E.D. Va. 2005) (same).

DOL has effectively imported the tort-law notion of proximate cause to conclude that the *most salient cause* (as between the two) is the fiduciary's imprudence. *See id.* ("What we mean by the word proximate, one noted jurist has explained, is simply this: Because of convenience, of public policy, of a rough sense of justice, the law arbitrarily declines to trace a series of events beyond a certain point.") (omission in original) (internal quotation marks and alteration omitted).

We deem this "a reasonable interpretation of the statute." *Entergy Corp.*, 556 U.S. at 218. ERISA "allocates liability for plan-related misdeeds in reasonable proportion to the respective actors' power to control and prevent the misdeeds." *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 262 (1993). As compared to the beneficiary, the fiduciary is better situated to prevent the losses that would stem from the inclusion of unsound investment options. It can design a prudent menu of options. Second, *Chevron* deference is meant to foster "coherent and uniform construction of federal law." *Orthopaedic Hosp. v. Belshe*, 103 F.3d 1491, 1495 (9th Cir. 1997). Our acknowledgment of the flexibility inherent in the phrase "result from" promotes this, because DOL adopts a similar interpretation with regard to breaches that – unlike claims of imprudent plan design – *do* chronologically follow a participant's decision. Concluding that "a fiduciary is relieved of responsibility only for the direct and necessary consequences of a participant's exercise of control," 57 Fed. Reg. at 46,924, DOL takes the position that errors in carrying out the investment elections of

a beneficiary give rise to liability notwithstanding that any associated loss technically also "results from such participant's or beneficiary's exercise of control." 29 U.S.C. § 1104(c)(1)(A)(ii). These are just the sort of "difficult policy choices that agencies are better equipped to make than courts." *Brand X*, 545 U.S. at 980.

We also reject the argument raised by Edison and the Employment Law Council that DOL's interpretation renders section 404(c) a meaningless provision. When certain conditions are complied with,[10] the provision safeguards fiduciaries from being liable for participants' substantive investment decisions. 57 Fed. Reg. at 46,924. "The purpose of section 404(c) is to relieve the fiduciary of responsibility for choices made by someone beyond its control." *Howell*, 633 F.3d at 567. These include matters such as, hypothetically, "the participant's decision to invest 40% of her assets in Fund A and 60% in Fund B, rather than splitting assets somehow among four different funds, [or] emphasizing A rather than B." *Id.*

It is, indeed, the contrary view pressed by Edison that would render parts of the ERISA statute a nullity by making it nearly impossible for defined-contribution-plan beneficiaries to vindicate fiduciary imprudence. *Cf. LaRue v. DeWolff, Boberg & Assocs.*,

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[10] Among these are that at least three investment options are offered, "which constitute a broad range of investment alternatives," and that participants have the power to direct their investments "no less frequently than once within any three month period." 29 C.F.R. § 2550.404c1(b)(2)(ii)(C)(1).

Inc., 552 U.S. 248, 256 (2008) (citing the DOL's regulations implementing section 404(c) in rejecting the converse interpretation); *see also Langbecker*, 476 F.3d at 321 (Reavley, J., dissenting) ("All commentators recognize that § 404(c) does not shift liability for a plan fiduciary's duty to ensure that each investment option is and continues to be a prudent one.").

Because DOL's interpretation of how the safe harbor functions is consistent with the statutory language, we conclude that the district court properly decided that section 404(c) did not preclude merits consideration of beneficiaries' claims. *See Tibble*, 639 F. Supp. 2d at 1121.

IV

Edison on its cross appeal raises another argument that could waylay our analysis of beneficiaries' substantive claims on their appeal. It contends that the district court improperly certified beneficiaries' case as a class action under Federal Rule of Civil Procedure 23.

Rule 23 sets out four prerequisites in subsection (a). A class must be "so numerous that joinder of all members is impracticable," (a)(1), there must be "questions of law or fact common to the class," (a)(2), "the claims or defenses of the representative parties" must be "typical of the claims or defenses of the class," (a)(3), and those representatives must "fairly and adequately protect the interests of the class," (a)(4). Classes must also comply with "at least one of the

requirements of Rule 23(b)." *Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1186 (9th Cir. 2001).

For the first time on its cross appeal and relying on out-of-circuit authority, Edison argues that this class action was improperly certified because the claims of the representative plaintiffs are not typical to the claims of the class at large. *See Spano v. Boeing Co.*, 633 F.3d 574, 586 (7th Cir. 2011) (expounding on Rule 23(a)(3)'s "typicality requirement"). In *Spano*, the court stated that "it seems that a class representative in a defined-contribution case would at a minimum need to have invested in the same funds as the class members." *Id.* Seizing on this statement, Edison contends that one of the three funds successfully litigated at trial was not held by any of the six named plaintiffs.[11] This violates Rule 23(a)(3), it claims, and requires that we reverse the class certification order.

Beneficiaries correctly argue that arguments not raised in the district court ordinarily will not be considered on appeal. *Dream Palace v. Cnty. of Maricopa*, 384 F.3d 990, 1005 (9th Cir. 2004). "This rule serves to ensure that legal arguments are considered with the benefit of a fully developed factual record, offers appellate courts the benefit of the district court's prior analysis, and prevents parties from sandbagging their opponents with new arguments on appeal." *Id.* In contrast to this typicality argument, Edison's

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[11] The MFS Total Return fund.

only Rule 23(a) arguments below were (i) a lack of commonality because the then-live misrepresentation claims would require individualized proof of reliance and (ii) a failure of adequacy. Edison concedes that it framed its argument strictly "as an adequacy issue below" but claims that because this inquiry *can overlap* with the typicality analysis, its presentation in the lower court suffices.

While we have indulged some liberality as to whether a particular Rule 23(a) subdivision has been pressed,[12] the presentation must have been "raised sufficiently for the trial court to rule on it." *In re Mercury Interactive Corp. Sec. Litig.*, 618 F.3d 988, 992 (9th Cir. 2010). Here, the district court found that "[d]efendants [did] not challenge whether the claims of the individual plaintiffs are typical to the class." As to adequacy, Edison's critique below centered on a "contention that the named plaintiffs [were] nothing more than 'window dressing or puppets for class counsel'" in that they were not knowledgeable about their legal claims – a far cry from its appellate contention about these beneficiaries' investments.[13] In

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[12] *See, e.g., Dukes v. Wal-Mart Stores, Inc.*, 603 F.3d 571, 612-13 (9th Cir. 2010) (en banc), *rev'd on other grounds by Wal-Mart Stores Inc. v. Dukes*, 131 S. Ct. 2541 (2011).

[13] Although there are exceptions to waiver when "the issue is purely one of law, does not affect or rely upon the factual record developed by the parties, and will not prejudice the party against whom it is raised," these criteria are not satisfied. *Dream Palace*, 384 F.3d at 1005. Which funds the named plaintiffs invested in is a factual issue and the beneficiaries almost

(Continued on following page)

light of the failure to present the issue to the district court, we expressly reserve the question of whether the Ninth Circuit should adopt a rule akin to that articulated in *Spano*, or whether the circumstances of that case would be distinguishable from ours.[14]

V

We now turn to the merits of the main appeal. Beneficiaries argue that the district court erred in granting summary judgment to Edison on their claim that revenue sharing between mutual funds and the administrative service provider violated the Plan's governing document, as well as was a conflict of interest.

A

Because ERISA requires fiduciaries to discharge their du[illegible] "in accordance with the documents

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certainly would have tried their case differently (*i.e.*, chosen different representatives) had this issue been raised at the appropriate stage, thus demonstrating prejudice. *Janes v. Wal-Mart Stores, Inc.*, 279 F.3d 883, 888 n.4 (9th Cir. 2002). Given that Edison's Rule 23(a) argument on appeal is new and does not fall within the recognized, but narrow, exceptions to this form of waiver, we exercise our discretion to decline to decide it. *Dream Palace*, 384 F.3d at 1005.

[14] And since it has not even been raised on appeal, we also express no view about whether defined-contribution plans are properly certified under Rule 23(b)(1)(A), as the district court concluded.

and instruments governing the plan," 29 U.S.C. § 1104(a)(1)(D), violations of the written plan have been recognized as a basis for liability. *See, e.g., Cal. Ironworkers Field Pension Trust v. Loomis Sayles & Co.*, 259 F.3d 1036, 1042 (9th Cir. 2001).[15]

Since 1997, Plan section 19.02 has stated: "The cost of the administration of the Plan will be paid by the Company." Edison contracted with Hewitt Associates, LLC, for a variety of services, including the drafting of Plan updates and regulatory reports. Hewitt also maintained the system by which beneficiaries designate their contribution amounts and make their investment elections. The addition of a large menu of mutual funds in 1999 made the Plan more expensive to administer, so Edison availed itself of a practice known in the industry as revenue sharing. Under this arrangement, mutual funds transfer a portion of their fees to the Plan's service provider, Hewitt. That revenue reimburses Hewitt for its recordkeeping and other costs. In turn, Edison receives a credit on its bills from Hewitt.

Beneficiaries, while conceding this new practice of revenue sharing was disclosed during the negotiations to expand the Plan offerings, argue that the

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[15] *See also* 2 Ronald J. Cooke, ERISA Practice and Procedure § 6:10 (2012) ("Courts have consistently ruled that action inconsistent with plan documents constitutes a breach of fiduciary duty."). As in *California Ironworkers*, we simply assume, without deciding, that beneficiaries' theory is actionable. 259 F.3d at 1042.

arrangement violated the language of the Plan because it allowed Edison to escape from part of the obligation to pay. With a December 26, 2006 amendment this Plan language was revised to state that "[t]he cost of administration of the Plan, *net of any adjustments by service providers,* will be paid by the Company." (emphasis added). The parties agree that under the new language these offsets are perfectly appropriate. The issue that arises, however, is whether the district court correctly determined that no triable issue existed over whether the pre-amendment version of section 19.02 allowed offsets. *See* Fed. R. Civ. P. 56(a). At bottom, this is a simple interpretive matter, but like most issues arising under ERISA there are complications.

I

In addition to the pension plan at issue in this case, ERISA also governs "employee welfare benefit" plans such as those for health or disability. *See* 29 U.S.C. § 1002(1)-(2). "[T]he validity of a claim to benefits under an ERISA plan is likely to turn on the interpretation of terms in the plan at issue." *Firestone Tire & Rubber Co. v. Bruch,* 489 U.S. 101, 115 (1989). The Supreme Court has handed down a trio of opinions explaining the framework for review when those disputes reach the judiciary. *See Conkright,* 130 S. Ct. at 1646 (discussing the Court's two prior precedents, *Firestone* and *Metropolitan Life Insurance Co. v. Glenn*). The proper standard of review hinges, in part, on what the plan instrument

says about interpretation. When the plan is silent, judges review its terms de novo. But, when the plan grants interpretive authority to its administrator, as is usually the case, a deferential abuse of discretion standard applies to the administrator's determinations.

The Edison Plan has a provision that speaks to interpretation; it vests the company's Benefits Committee with the "full discretion to construe and interpret [its] terms and provisions." *See, e.g., Sandy v. Reliance Std. Life Ins. Co.,* 222 F.3d 1202, 1206-07 & n.6 (9th Cir. 2000). The Plan even purports to make interpretations by the Committee "final and binding on all parties." Taking stock of these principles, the district court applied the abuse of discretion standard and then concluded that Edison's view that the language did not foreclose revenue sharing had been reasonable.

Yet, as we noted at the outset, the Supreme Court expounded these interpretive principles in the context of "§ 1132(a)(1)(B) actions challenging denials of benefits." *Firestone,* 489 U.S. at 108. The Second Circuit has declined to apply the arbitrary and capricious standard from *Firestone* outside of the benefits context. *See John Blair Commc'ns, Inc. Profit Sharing Plan v. Telemundo Grp., Inc. Profit Sharing Plan,* 26 F.3d 360, 369-70 (2d Cir. 1994). Other circuits have read *Firestone* more broadly, stating that its deference can reach beyond ERISA actions that arise under section 1132(a)(1). *See, e.g., Hunter v. Caliber Sys., Inc.,* 220 F.3d 702, 711 (6th Cir. 2000) ("[W]e find

no barrier to application of the arbitrary and capricious standard in a case such as this not involving a typical review of denial of benefits."); *Moench v. Robertson*, 62 F.3d 553, 565 (3d Cir. 1995) ("[W]e believe that after *Firestone*, trust law should guide the standard of review over claims, such as those here, not only under section 1132(a)(1)(B) but also over claims filed pursuant to 29 U.S.C. § 1132(a)(2) based on violations of the fiduciary duties set forth in [ERISA § 404].").

In relevant part, *John Blair* involved a challenge under ERISA § 404 to how assets had been allocated. 26 F.3d at 370. The plaintiffs argued that the defendant had breached its fiduciary duty by retaining surplus income generated by virtue of a lag between when plan members elected to move assets and the actual transfer of the funds. *Id.* at 362, 368. As a defense, the fiduciary argued that the terms of the Plan authorized it to allocate the assets as it had, and that because the Plan "gave the plan committee discretion to interpret the provisions of the [P]lan" the court was bound to approve of its allocation unless it determined that the decision to do so had been "arbitrary and capricious" under *Firestone*. *Id.* at 369.

Rejecting that framework, the Second Circuit instead decided to evaluate the claim under the "prudent person standard articulated in § 404 of ERISA." *Id.* As support for this approach, the court cited a pre-*Firestone* authority from the Third Circuit and a pair of district court decisions from within the Second Circuit. *See Struble v. N.J. Brewery Emps. Welfare*

Trust Fund, 732 F.2d 325, 333-34 (3d Cir. 1984); *Ches v. Archer,* 827 F. Supp. 159, 165-66 (W.D.N.Y. 1993); *Trapani v. Consol. Edison Emps.' Mut. Aid Soc'y, Inc.,* 693 F. Supp. 1509, 1515 (S.D.N.Y. 1988). Relying on *John Blair* and *Struble,* beneficiaries argue that their claim is similarly exempt from *Firestone.* We disagree.

As noted above, this specific challenge by beneficiaries has been brought under 29 U.S.C. § 1104(a)(1)(D), which is part of ERISA § 404. *See Tibble,* 639 F. Supp. 2d at 1096 (explaining that beneficiaries "move[d] for summary judgment on the basis that [Edison] violated the terms of the Plan by failing to pay the full extent of Hewitt's recordkeeping costs"). While subsection (a)(1)(B) codifies the statutory prudent-person standard, subsection (a)(1)(D) simply requires that actions be in line with the plan documents. *See* 29 U.S.C. § 1104(a)(1). *John Blair* was an attempt by a fiduciary to escape from otherwise applicable duties on the basis of a plan interpretation. The Second Circuit declined to apply *Firestone* deference because of a concern about bootstrapping. *See John Blair,* 26 F.3d at 369. Similarly, the district court decisions it favorably cited were examples of fiduciaries trying to weaken or evade the statutory standard of prudence. *See Ches,* 827 F. Supp. at 165 (rejecting defendants' argument that "they cannot be found to have breached their fiduciary duties in the absence of an allegation and a showing that their determinations had been arbitrary and capricious"); *Trapani,* 693 F. Supp. at 1514 ("Defendants argue

that the court must apply an arbitrary and capricious standard, rather than the prudent man standard specifically set forth in the statute.").[16]

Edison is not making any such argument here, as beneficiaries have not pursued this challenge as a violation of the prudent person standard; instead, their contention rises or falls exclusively on what Plan section 19.02 allows.[17] As to issues of plan interpretation that do not implicate ERISA's statutory duties, they are subject to *Firestone*.

At least three considerations prompt us to hold that the *Firestone* framework can govern issues of plan interpretation even when they arise outside the benefits context. First, while the *Firestone* case

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[16] The *Struble* case is even farther afield; in relevant part, it did not concern an issue of plan interpretation at all. *See* 732 F.2d at 331-35. Arising during a period of lower court uncertainty about the proper standard(s) of review under ERISA, *see de Nobel v. Vitro Corp.*, 885 F.2d 1180, 1184-85 (4th Cir. 1989), *Struble* involved a claim that the employer trustee had breached its duties of care and loyalty by "failing to collect the amount of Employer contributions allegedly required by the Employers' respective bargaining agreements." 732 F.2d at 331. The Third Circuit decided to apply "the standards set forth explicitly in ERISA" rather than the arbitrary and capricious standard. *Id.* at 333.

[17] We thus leave for another day what judicial-review standard would apply in a case like *John Blair* where the Plan is said to authorize what the statutory duties codified in ERISA forbid. Next, in Part V.B of the opinion, we explain why these beneficiaries' claim that revenue sharing was a conflict of interest under ERISA § 406 fails.

did not announce a holding beyond benefits, its rationale did *not* stem from an interpretive gloss on the welfare-benefits provision of ERISA. *See* 489 U.S. at 108, 109 ("ERISA does not set out the appropriate standard of review for actions under § 1132(a)(1)(B) challenging benefit eligibility determinations."). Instead, because "ERISA abounds with the language and terminology of trust law" and because of legislative history to that effect, that body of law – not a discrete provision – dictated "the appropriate standard of review." *Id.* at 110-11 ("Trust principles make a deferential standard of review appropriate when a trustee exercises discretionary powers."). The law of trusts was the basis for the dual-track standard whereby, absent a contrary designation, de novo review applies. *See id.* at 111. The Supreme Court's most recent analysis of *Firestone* reenforces that the deference underlying that case is a product of what trust law has to say about matters of interpretation. *See Conkright*, 130 S. Ct. at 1646 ("[U]nder trust law, the proper standard of review of a trustee's decision depends on the language of the instrument creating the trust. If the trust documents give the trustee power to construe disputed or doubtful terms, the trustee's interpretation will not be disturbed if reasonable." (alterations in original) (internal citation and quotation marks omitted)).

Second, one reason the Court in *Conkright* rejected an exception the Second Circuit had carved out from *Firestone* deference was its potential to create "uniformity problems." 130 S. Ct. at 1650. The

concern was that if de novo review sometimes applied, fiduciaries would be in the "impossible situation" of being subject to different plan interpretations by courts depending on the particular facts of the cases where the interpretive issue had arisen. *Id.* Not applying *Firestone* deference in this case would risk similar difficulties, as parts of a plan could be assigned one meaning when litigated under section 1132(a)(1)(B) and another meaning when litigated, such as here, under section 1104(a)(1)(D).

Third, we observe that consistently applying *Firestone* to the question of what a plan means, "by permitting an employer to grant primary interpretive authority over an ERISA plan to the plan administrator," has the virtue of "preserv[ing] the 'careful balancing' on which ERISA is based." *Id.* at 1649. In particular, it helps keep administrative and litigation expenses under control, which otherwise could "discourage employers from offering [ERISA] plans in the first place." *Id.* (alteration in original).

2

ERISA administrators abuse their discretion if they act without explanation or "construe provisions of the plan in a way that conflicts with the plain language of the plan." *Day v. AT & T Disability Income Plan,* 698 F.3d 1091, 1096 (9th Cir. 2012). We are instructed not to disturb those interpretations if they are reasonable. *See Conkright,* 130 S. Ct. at 1651.

To start with, we discern no explicit conflict with the plain language of the Plan. *See Day*, 698 F.3d at 1096. Section 19.02 required the company to pay the costs, and Edison did. Although beneficiaries argue that the "costs" are the expenses associated with Hewitt before the offsets, the more natural reading is that "costs" simply are whatever bills Hewitt presented Edison with. Under this commonsense reading, the Plan merely assigned Edison an affirmative obligation to pay. It did not, as beneficiaries would have it, prohibit "Hewitt's recordkeeping services from being paid by a third party such as mutual funds." That kind of interpretation, nonsensically, would also imply that if Hewitt had simply lowered its prices (maybe due to efficiency or market pressure) Edison would be somehow shirking its obligation under Plan § 19.02.

Beyond the text, in conducting abuse of discretion review, courts consider "various [other] criteria for determining the reasonableness of a fiduciary's discretionary decision." *Booth v. Wal-Mart Stores, Inc. Assocs. Health & Welfare Plan*, 201 F.3d 335, 342 (4th Cir. 2000). Viewing the matter in terms of those considerations further establishes the soundness of Edison's position. Its view is most "consistent with the goals of the plan," as it facilitated the expansion of the Plan's mutual fund offerings. *Id.* We also note that section 19.02 has been applied consistently over time. Undisputed evidence showed that the union negotiators and Edison had "extensive discussions with regard to how revenue sharing from the mutual funds

would be used." Also, between 1999 when the process started, and 2006 when the language was modified, on at least seventeen occasions participants were specifically advised that mutual funds were being used to reduce the cost of retaining Hewitt. For example, one Summary Plan Description in evidence said: "the fees received by Edison's 401(k) plan recordkeeper are used to reduce the recordkeeping and communication expenses of the plan paid by the company." Another consideration under the abuse of discretion standard is "whether the challenged interpretation is at odds with the procedural and substantive requirements of ERISA itself." *de Nobel v. Vitro Corp.*, 885 F.2d 1180, 1188 (4th Cir. 1989) (citing *Blau v. Del Monte Corp.*, 748 F.2d 1348, 1353 (9th Cir. 1984)). Although we explain the reasoning behind this observation next, we are satisfied that revenue sharing as carried out by Edison does not violate ERISA.

B

Beneficiaries alternatively argue that the statute's conflicts provision, ERISA § 406(b)(3), prohibits the practice of revenue sharing. ERISA § 406 is similar to a duty-of-loyalty provision. *See Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 143 n.10 (1985). It prohibits the type of business deals "likely to injure the pension plan." *Wright v. Or. Metallurgical Corp.*, 360 F.3d 1090, 1100 (9th Cir. 2004).

1

ERISA § 406(b)(3) provides that:

> A fiduciary with respect to a plan shall not receive any consideration for his own personal account from any party dealing with such plan in connection with a transaction involving the assets of the plan.

29 U.S.C. § 1106(b)(3). Beneficiaries' claim is that Edison's revenue sharing arrangement violated this provision because Edison received "consideration" in the form of discounts for administrative expenses from Hewitt, which was a "party dealing with" the Plan. The DOL, though, has issued several non binding advisory opinions staking out the position that a fiduciary does not violate section 406(b)(3) so long as "the decision to invest in such funds is made by a fiduciary who is independent" of the fiduciary receiving the fee. DOL Advisory Op. 2003-09A, 2003 WL 21514170 (June 25, 2003); *see also* DOL Advisory Op. 97-15A, 1997 WL 277980 (May 22, 1997) (fiduciary that "does not exercise any authority or control" to cause the suspect investment is not liable).

Relying on these concepts, the district court granted summary judgment to Edison. To do so, it conceived of "Edison," not as a unified corporate entity, but in terms of its constituent parts. In brief, the "fiduciaries" named in the Plan include the Southern California Edison Benefits Committee and its members, as well as the Edison International Trust Investment Committee and its members. The "Plan

Sponsor" is Southern California Edison, while its Benefits Committee is designated under ERISA as the "Plan Administrator." *See* 29 U.S.C. § 1002(16)(A)(i), (B).[18] Edison International's CEO appoints the Investment Committee and Southern California Edison's CEO handles appointments to the Benefits Committee.

In light of this diffusion of responsibility, the district court observed that, as the sole contracting party with Hewitt, only the subsidiary Southern California Edison had received the credit from administrative expenses. It then noted that it was the Investment Committee of the parent company, Edison International, which had selected the mutual funds that featured revenue sharing. From this, the court drew the conclusion that a different fiduciary had received the "consideration" than the fiduciary which had (in the DOL's parlance) exercised "authority or control" over the offending investment. Therefore, the mutual fund revenue sharing had not violated section 406(b)(3).

As amicus curiae, the DOL vigorously objects to the lower court's parsing of Edison International this way, and objects to what it considers an overly broad reading of its advisory opinions. DOL maintains that

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[18] To the extent a Plan Sponsor has or exercises discretionary authority in the administration or management of the Plan, ERISA deems that sponsor a fiduciary. *See Mathews v. Chevron Corp.*, 362 F.3d 1172, 1178 (9th Cir. 2004) (discussing 29 U.S.C. § 1002(21)(A)).

permitting "fiduciaries to make plan asset investment decisions that result in the company on which they serve as directors and officers receiving an economic benefit from a third party is precisely the kind of transaction – rife with the potential for abuse – that Congress intended to prohibit in section 406(b)(3)." In response, Edison argues that the separate legal identities of the committees and companies are meaningful, and calls to our attention the district court's finding that beneficiaries had not marshaled evidence that justified disregarding their putative separateness.

We review the district court's entry of summary judgment de novo, and we are empowered to affirm on any basis the record will support. *See Gordon v. Virtumundo, Inc.*, 575 F.3d 1040, 1047 (9th Cir. 2009). In light of that, we reserve for another case whether the lower court's control determinations are defensible and, instead, proceed to consider the basis for affirmance expressly advocated by the DOL.

2

The DOL directs our attention to its regulatory interpretation at 29 C.F.R. § 2550.408b-2(e)(3), which states that "[i]f a fiduciary provides services to a plan without the receipt of compensation or other consideration (other than reimbursement of direct expenses properly and actually incurred in the performance of such services), the provision of such services does not, in and of itself, constitute an act described in

section 406(b) of the Act." Assuming that the Edison Plan permitted revenue sharing (as we concluded above), then as DOL explains, the discounts on its invoices from Hewitt "would not constitute the receipt of any 'consideration'" by Edison "within the meaning of the section 406(b)(3) prohibition." In further support, the agency cites one of its opinion letters that permitted, under the authority of section 2550.408b-2(e), a fiduciary to receive reimbursement from an unrelated mutual fund of direct expenses for which the plan would otherwise be liable. *See* DOL Advisory Op. 97-19A, 1997 WL 540069 (Aug. 28, 1997).

The district court intimated that our *Patelco Credit Union v. Sahni* decision might be to the contrary. 262 F.3d 897 (9th Cir. 2001). It is not, although we do not fault the district court for its misconception. It did not have the advantage, afforded us, of DOL's participation in tackling these regulatory intricacies. In *Patelco,* the fiduciary had wrongfully deposited ERISA Plan assets – two checks payable to the company – into his own account. *Id.* at 903, 908. This straightforwardly constituted "consideration for his own personal account" from a "party dealing with [the] plan," in violation of ERISA § 406(b)(3). *Id.* at 909-10. Confronted with that scenario, we vindicated DOL's pronouncement that when a fiduciary self-deals in violation of ERISA § 406(b), the "reasonable compensation exception" found in section 408(b)(2) cannot be used as a shield from liability. *Id.* at 910-11; *see also Dupree v. Prudential Ins. Co. of Am.*, No.

99-8337, 2007 WL 2263892, at *42 (S.D. Fla. Aug. 7, 2007) (explaining this).[19]

By contrast in our case, section 2550.408b-2(e)(3), as it is "routinely interpreted by the DOL," exempts revenue sharing payments from the very definition of consideration. *Dupree,* 2007 WL 2263892, at *42. The Department's position is that rather than constituting "consideration," "such payments may be considered 'reimbursement' within the meaning of regulation section 2550.408b-2(e)." DOL Advisory Op. 97-19A.[20] That means it is not a section 406(b)(3) violation at all.

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[19] ERISA § 408 grants exemptions from prohibited transactions. At issue in *Patelco* was the part of that section stating "[n]othing in section 1106 of this title shall be construed to prohibit any fiduciary from . . . (2) receiving any reasonable compensation for services rendered, or for the reimbursement of expenses properly and actually incurred, in the performance of his duties with the plan. . . ."

[20] Lest there be any doubt about the distinction between the issue in *Patelco* and the issue that arises in this case, we point out that in this very same advisory opinion the DOL also discusses the interpretation we upheld in *Patelco* – thus demonstrating that the two interpretations are compatible. *Compare* Advisory Op. 97-19A ("Regulation 29 C.F.R. 2550.408b-2(a) indicates that ERISA section 408(b)(2) does not contain an exemption for an act described in section 406(b) even if such act occurs in connection with a provision of services which is exempt under section 408(b)(2)."), *with Patelco,* 262 F.3d at 910 (quoting section 2550.408b2(a) as stating "[h]owever, section 408(b)(2) does not contain an exemption from acts described in section 406(b)(1) of the Act . . . section 406(b)(2) of the Act . . . or section 406(b)(3) of the Act.).

Aside from citing *Patelco* as the lower court understood it, beneficiaries' only response is, in effect, that we ought to read DOL's regulations and opinion letters differently than DOL has counseled in its amicus brief. We decline to do so. Notably, courts are instructed to "defer to an agency's interpretation of its own regulation, advanced in a legal brief unless that interpretation is 'plainly erroneous or inconsistent with the regulation.'" *Chase Bank USA, N.A. v. McCoy*, 131 S. Ct. 871, 880 (2011) (discussing *Auer* deference). We mention this not because we resolve whether this view is permissible either under ERISA or the regulation, but simply to explain why beneficiaries have not convinced us to reject DOL's interpretation in this case.

VI

Beneficiaries next claim that Edison violated its duty of prudence under ERISA by including several investment vehicles in the Plan menu: (i) mutual funds, (ii) a short-term investment fund akin to a money market, and (iii) a unitized fund for employees' investment in Edison stock.

A

ERISA demands that fiduciaries act with the type of "care, skill, prudence, and diligence under the circumstances" not of a lay person, but of one experienced and knowledgeable with these matters. 29 U.S.C. § 1104(a)(1)(B). Fiduciaries also must act exclusively

in the interest of beneficiaries. *Id.* § 1104(a)(1). These obligations are more exacting than those associated with the business judgment rule so familiar to corporate practitioners, *Howard v. Shay*, 100 F.3d 1484, 1489 (9th Cir. 1996), a standard under which courts eschew any evaluation of "substantive due care." *Brehm v. Eisner*, 746 A.2d 244, 264 (Del. 2000), *cited in Pac. Nw. Generating Coop. v. Bonneville Power Admin.*, 596 F.3d 1065, 1077 (9th Cir. 2010). To enforce this duty of prudence, we consider the merits of the transaction and "the thoroughness of the *investigation* into the merits of the transaction." *Howard*, 100 F.3d at 1488 (emphasis added). Courts are in broad accord that engaging consultants, even well-qualified and impartial ones, will not alone satisfy the duty of prudence. *See George v. Kraft Foods Global, Inc.*, 641 F.3d 786, 799-800 (7th Cir. 2011) (collecting cases from the Second, Fifth, Seventh, and Ninth Circuits).

Under the common law of trusts, which helps inform ERISA, a fiduciary "is duty-bound 'to make such investments and only such investments as a prudent [person] would make of his own property having in view the preservation of the [Plan] and the amount and regularity of the income to be derived.'" *In re Unisys.*, 74 F.3d at 434 (quoting Restatement (Second) of Trusts § 227 (1959)) (first alternation in original).

B

1

A mutual fund is a pool of assets, chiefly a portfolio of securities bought with the capital contributions of the fund's shareholders. *Jones v. Harris Assocs. L.P.*, 130 S. Ct. 1418, 1422 (2010). Joined by the AARP as an amicus, beneficiaries seek a ruling that including mutual funds of the sort available to the investing public at large ("retail" or "brand-name" funds) is categorically imprudent. Their position is that under ERISA, fiduciaries must offer institutional investment alternatives such as "commingled pools" or "separate accounts."

Mutual funds, however, have a variety of unique regulatory and transparency features that make it an apples-to-oranges comparison to judge them against AARP and beneficiaries' suggested options. As Chief Judge Easterbook, writing for the Seventh Circuit, has usefully summarized:

> A pension plan that directs participants into privately held trusts or commingled pools (the sort of vehicles that insurance companies use for assets under their management) lacks the mark-to-market benchmark provided by a retail mutual fund. It can be hard to tell whether a closed fund is doing well or poorly, or whether its expenses are excessive in relation to the benefits they provide. It can be hard to value the vehicle's assets (often real estate rather than stock or bonds) when someone wants to withdraw money,

> and any error in valuation can hurt other investors.

Loomis v. Exelon Corp., 658 F.3d 667, 671-72 (7th Cir. 2011). As beneficiaries admit in their briefing, brand-name mutual funds are generally easy to track via newspaper or internet sources. This, in fact, was a stated goal of the report issued by the Joint Study Group of human resource managers and employee union representatives empaneled to expand the Plan menu. Relatedly, as other courts have recognized, non-mutual fund alternatives such as commingled pools are not subject to the same "reporting, governance, and transparency requirements" as mutual funds, which are governed by the Securities Act of 1933 and the Investment Company Act of 1940. *See Renfro v. Unisys Corp.*, 671 F.3d 314, 318 (3d Cir. 2011); *Harris Assocs.*, 130 S. Ct. at 1422.

Further, the undisputed evidence was that during collective bargaining the union requested "forty name-brand retail mutual funds for inclusion in the Plan." While conceding this, the beneficiaries claim that the union did not know what was in its members' best interest. Because participant choice is the centerpiece of what ERISA envisions for defined-contribution plans, these sorts of paternalistic arguments have had little traction in the courts. *See, e.g., Loomis*, 658 F.3d at 673; *Renfro*, 671 F.3d at 327-28 (observing that imprudence is less plausible "in light of an ERISA defined-contribution 401(k) plan having a reasonable range of investment options with a variety of risk profiles and fee rates").

Also before us under the mutual fund umbrella is beneficiaries' claim that the particular mutual funds Edison selected charged excessive fees, which rendered their inclusion imprudent. Part of this challenge is a broadside against retail-class mutual funds, which do generally have higher expense ratios than their institutional-class counterparts. As the district court explained in its post-trial findings of fact, this is because with institutional-class mutual funds "the amount of assets invested is far greater than [that associated with] the typical individual investor." The Seventh Circuit has repeatedly rejected the argument that a fiduciary "should have offered only 'wholesale' or 'institutional' funds." *See Loomis,* 658 F.3d at 671; *Hecker,* 556 F.3d at 586 ("[N]othing in ERISA requires [a] fiduciary to scour the market to find and offer the cheapest possible fund (which might, of course, be plagued by other problems)."). We agree. There are simply too many relevant considerations for a fiduciary, for that type of bright-line approach to prudence to be tenable. *Cf. Braden v. Wal-Mart Stores, Inc.,* 588 F.3d 585, 596 (8th Cir. 2009) (acknowledging that a fiduciary might "have chosen funds with higher fees for any number of reasons, including potential for higher return, lower financial risk, more services offered, or greater management flexibility").

Nor is the particular expense ratio range out of the ordinary enough to make the funds imprudent. In *Hecker,* the court upheld the dismissal of a similar excessive fee claim where the range of expenses varied

from .07 to 1% across a pool of twenty mutual funds. 556 F.3d at 586. Here, the summary-judgment facts showed that the expense ratio varied from .03 to 2%, and there were roughly forty mutual funds to choose from.

3

Before we leave the topic of mutual funds we find it necessary to make one last observation. Much time at oral argument and ink in the briefs were devoted to debating the question of whether the revenue sharing typically associated with mutual funds adversely impacts plan beneficiaries. Today we have held that the practice here did not violate the terms of the Edison Plan or violate ERISA § 406(b)(3).

Mutual funds generate this revenue by charging what is known as a Rule 12b-1 fee to all investors participating in the fund.[21] Edison takes the position that because that fee applies to Plan beneficiaries and all other fund investors alike, the allocation of a portion of that total 12b-1 fee to Hewitt is irrelevant. As it put the matter at oral argument: "the mutual

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[21] *See Meyer v. Oppenheimer Mgmt. Corp.*, 895 F.2d 861, 863 (2d Cir. 1990) ("Promulgated in 1980, [U.S. Securities and Exchange Commission] Rule 12b-1 permits an open-end investment company to use fund assets to cover sale and distribution expenses pursuant to a written plan approved by a majority of the fund's board of directors . . and a majority of the fund's outstanding voting shares. . . . Prior to this Rule, brokers had to bear these expenses themselves.").

fund advisor can do whatever it wants with the fees; sometimes they share costs with service providers who assist them in providing service and sometimes they don't." This benign-effect, of course, assumes that the "cost" of revenue sharing is not driving up the fund's total 12b-1 fee and, in turn, its overall expense ratio. It also assumes that fiduciaries are not being driven to select funds because they offer them the financial benefit of revenue sharing. The former was not explored in this case and the evidence did not bear out the latter,[22] but we do not wish to be understood as ruling out the possibility that liability might – on a different record – attach on either of these bases.

C

The next contention can be addressed briefly. Beneficiaries argue that it was imprudent for Edison to include a short-term investment fund (or "STIF") rather than a stable value fund. Both types of investments are conservative in that they emphasize capital preservation rather than the maximization of returns. A stable value fund generally consists of short-to-medium duration bonds paired with insurance contracts that guard against interest rate volatility, and the record here indicates that beneficiaries

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[22] In fact, the district court found that "in 33 of 39 instances, the changes to the mutual funds in the Plan evidenced either a decrease or no net change in the revenue sharing received by the Plan."

are correct that they typically outperform money market funds. A STIF is similar to a traditional money market fund, which invests in what might be loosely termed "money," instruments such as "short-term securities of the United States Government or its agencies, bank certificates of deposit, and commercial paper." *Harris Assocs.*, 130 S. Ct. at 1426 n.6. The regulatory regime is different for the two instruments however: registered money markets must comply with the Investment Company Act, whereas banking regulations set the rules of the road for STIFs.

When applying the prudence rule in section 1104(a)(1)(B), "the primary question is whether the fiduciaries, at the time they engaged in the challenged transactions, employed the appropriate methods to investigate the merits of the investment and to structure the investment." *Cal. Ironworkers*, 259 F.3d at 1043 (internal quotation marks omitted). Thus, fatal to beneficiaries is uncontroverted evidence that there were discussions about the pros and cons of a stable-value alternative. Furthermore, an investment staffer testified at his deposition that in 1999 his team determined that a short-duration bond fund already on the menu filled the same investment niche as would have a stable value fund.

D

Beneficiaries also charge that the inclusion of the unitized stock investment was imprudent, despite it

being an industry standard for large 401(k)'s. Their main contention is that during the class period a roughly 77% gain in Edison's stock price yielded Plan investors only around a 67% return. But hindsight is the wrong metric for evaluating fiduciary duty. *See Roth v. Sawyer-Cleator Lumber Co.*, 16 F.3d 915, 918 (8th Cir. 1994); *DiFelice*, 497 F.3d at 424.

This dilution, or "investment drag," that occurs when stock prices rise as compared to a direct stock investment is a well-recognized characteristic of unitized funds. The reason they are called "unitized" is that participants own units of a fund that invests primarily in company stock, but also in "cash and other similar highly liquid investments." *George*, 641 F.3d at 792. These non-stock portions of the unitized fund generate lower rates of return than does the stock. Why use the device then? The advantages are twofold. The cashbuffer gives investors increased liquidity. *See id.* at 793 (explaining that money can be dispersed without delay because sales of units are paid out from the cash). Also, "in a market in which the relevant stock is declining, the presence of cash in the fund would be a good thing" because it functions as a hedge. *Id.*

Citing *George*, beneficiaries correctly note that, there, the court withheld summary judgment because there was a genuine issue of material fact as to whether the fiduciary had considered "implementing changes to the [fund] in order to reduce or eliminate investment and transactional drag." *Id.* at 796 n.8. Yet, by contrast, the district court here

found vigilance on the part of the Edison Investment Committee to minimize this phenomenon. "For example, in July 2004, the issue of how much cash should be held in the Edison Stock Fund was raised." Because active trading had decreased, the decision was made to reduce the cash target. *See Taylor v. United Techs. Corp.*, No. 3:06-CV-1494, 2009 WL 535779, at *9 (D. Conn. 2009) ("The evidence indicates that UTC's evaluation of the merits of retaining cash to provide transactional liquidity satisfies the prudent person standard."). Because the choice to include unitization was objectively reasonable as well as informed, and because the evidence establishes that Edison oversaw the fund as conditions changed, we agree that summary judgment was proper.

VII

Continuing with our application of the prudence standard, we confront the final issue in the case: Edison's argument on cross appeal that the district court erred in concluding – after a three-day bench trial and months of post-trial evidence and briefing – that the company had been imprudent in deciding to include retail-class shares of three specific mutual funds in the Plan menu.[23] The basis of liability was

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[23] They were the William Blair Small Cap Growth Fund, the PIMCO (Allianz) RCM Global Technology Fund, and the MFS Total Return Fund. As mentioned earlier, other retail funds for which the initial decision to invest was time-barred were litigated (unsuccessfully) under a theory that Edison breached its

(Continued on following page)

not the mere inclusion of retail-class shares, as the court had rejected that claim on summary judgment. Instead, beneficiaries prevailed on a theory that Edison has failed to investigate the possibility of institutional-share class alternatives.

A

In reviewing a judgment after a bench trial, we evaluate the district court's factual findings "for clear error and its legal conclusions de novo." *Lee v. W. Coast Life Ins. Co.*, 688 F.3d 1004, 1009 (9th Cir. 2012).

Here, the lower court's unchallenged findings are that during the relevant time period (i) all three funds offered institutional options in which the Edison 401(k) Savings Plan almost certainly could have participated,[24] (ii) those options were in the range of 24 to 40 basis points cheaper than the retail class options the Plan did include, and – crucially – (iii) between the class profiles, there were no salient differences in the investment quality or management.

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duties by not converting them into institutional shares upon the occurrence of "triggering events" after August 16, 2001.

[24] Although the funds advertised investment minimums, the district court amply documented that it is common knowledge in the financial industry that these will be waived for "large 401(k) plans with over a billion dollars in total assets, such as Edison's." In fact, defendants' own expert witness had "personally obtained such waivers for plans as small as $50 million in total assests [sic] – *i.e*, 5 percent the size of the Edison plan."

B

Since at least 1999, Edison has contracted with Hewitt Financial Services ("HFS")[25] for investment consulting advice. It argued below, and re-urges here, that it reasonably depended on HFS for advice about which mutual fund share classes should be selected for the Plan.

HFS frequently engages with the Investment Committee staff at Edison to help design and manage the Plan menu. It applies the investment staff's criteria: (1) fund stability/management, (2) diversification, (3) performance relative to benchmarks, (4) expense ratio relative to the peer group, and (5) the accessibility of public information on the fund. HFS then approaches the Committee with options and discusses their respective merit with its members. And to keep Edison abreast of developments, it provides the Committee with monthly, quarterly, and annual investment reports. We offer this background to illustrate a point, which, though it should be unmistakable, seems to have eluded Edison in its briefing. HFS is its consultant, not the fiduciary. "As Judge Friendly has explained, independent expert advice is not a 'whitewash.'" *Shay,* 100 F.3d at 1489 (quoting *Donovan v. Bierwirth,* 680 F.2d 263, 272 (2d Cir. 1982)). Our *Shay* factors recognize this by not simply requiring that the fiduciary (1) probe the expert's

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[25] HFS is an affiliate of the Plan's services provider, Hewitt Associates. Their respective roles are separate and distinct.

qualifications, and (2) furnish the expert with reliable and complete information, but also requiring it to "(3) make certain that reliance on the expert's advice is reasonably justified under the circumstances." *Id.*[26]

Applying *Shay,* the district court found that Edison failed to satisfy element (3) – reasonable reliance. We agree. Just as fiduciaries cannot blindly rely on counsel, *Donovan v. Mazzola,* 716 F.2d 1226, 1234 (9th Cir. 1983), or on credit rating agencies, *Bussian,* 223 F.3d at 301, a firm in Edison's position cannot reflexively and uncritically adopt investment recommendations. *See In re Unisys,* 74 F.3d at 435-36 ("[W]e believe that ERISA's duty to investigate requires fiduciaries to review the data a consultant gathers, to assess its significance and to supplement it where necessary."); *Shay,* 100 F.3d at 1490 (fiduciaries should "make an honest, objective effort" to grapple with the advice given and. if need be, "question the methods and assumptions that do not make sense"). The trial evidence – from both beneficiaries' and Edison's own experts – shows that an experienced investor would have reviewed all available share classes and the relative costs of each when selecting a mutual fund. The district court found an utter absence of evidence that Edison considered the possibility of institutional classes for the funds

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[26] This framework has been followed by our sister circuits. *See, e.g., Bussian v. RJR Nabisco, Inc.,* 223 F.3d 286, 301 (5th Cir. 2000); *Hightshue v. AIG Life Ins. Co.,* 135 F.3d 1144, 1148 (7th Cir. 1998).

litigated – a startling fact considering that supposedly the "expense ratio" was a core investment criterion.

However, because the "goal is not to duplicate the expert's analysis," had Edison made a showing that HFS engaged in a prudent process in considering share classes this might have been a different case. *Bussian,* 223 F.3d at 301. But despite having ample opportunities, Edison "did not present evidence of: the specific recommendations HFS made to the Investments Staff regarding those funds, what the scope of HFS's review was, whether HFS considered both the retail and institutional share classes" or what questions or "steps the Investments Staff [pursued] to evaluate HFS' recommendations."

On this record we have little difficulty agreeing with the district court that Edison did not exercise the "care, skill, prudence, and diligence under the circumstances" that ERISA demands in the selection of these retail mutual funds. 29 U.S.C. § 1104(a)(1)(B). Its cross appeal thus fails.

VIII

For the foregoing reasons, the judgment of the district court is **AFFIRMED**. The parties shall bear their own costs on appeal.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

GLENN TIBBLE, et al. Plaintiffs, v. EDISON INTERNATIONAL, et al. Defendants.	CV 07-5359 SVW (AGRx) FINDINGS OF FACT AND CONCLUSIONS OF LAW (Filed Jul. 8, 2010)

I. INTRODUCTION AND PROCEDURAL BACKGROUND

Named Plaintiffs Glenn Tibble, William Bauer, William Izral, Henry Runowiecki, Frederick Sohadolc, and Hugh Tinman, Jr. (collectively "Plaintiffs") filed this class action on August 16, 2007 on behalf of the Edison 401(k) Savings Plan ("the Plan") and all similarly-situated participants and beneficiaries of the Plan, against Defendants Edison International ("Edison"), Southern California Edison Company ("SCE"), the Southern California Edison Company Benefits Committee ("Benefits Committee"), the Edison International Trust Investment Committee ("TIC"), the Secretary of the SCE Benefits Committee, SCE's Vice President of Human Resources, and the Manager of SCE's Human Resources Service Center (collectively, "Defendants"). Plaintiffs sought to recover damages pursuant to the Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1132(a), for alleged financial losses suffered by the

Plan, in addition to injunctive and other equitable relief based on alleged breaches of Defendants' fiduciary duties. 29 U.S.C. §§ 1104, 1106.

On June 30, 2009, the Court granted Plaintiffs' motion for class certification and appointed Plaintiffs Bauer, Tibble, and Suhadolc as class representatives. The class is defined as: "All persons, excluding the Defendants and other individuals who are or may be liable for the conduct described in this Complaint, who were or are participants or beneficiaries of the Plan and who were, are, or may have been affected by the conduct set forth in the Second Amended Complaint." (Order at 21 [Docket No. 286].) In August 2009, the Court granted Plaintiffs' request to amend the class certification order so as to name Plaintiffs Izral, Runowiecki, and Tinman as class representatives. (Order [Docket No. 308].)

In May 2009, both parties filed motions for summary judgment or partial summary judgment. (Docket Nos. 146, 186.) The Court issued its rulings on the summary judgment motions on July 16, 2009 and July 31, 2009. The Court granted partial summary judgment in Defendant's favor as to the majority of Plaintiff's claims. Specifically, the Court granted summary judgment in Defendants' favor on the following claims asserted by Plaintiffs: (1) whether Defendants breached their fiduciary duty by selecting mutual funds for the Plan that did not perform as well as the Frank Russell Trust Company low-cost index funds; (2) whether SCE's receipt of revenue sharing from certain mutual funds which offset SCE's

payments to its record-keeper, Hewitt Associates, constituted a prohibited transaction under 29 U.S.C. § 1106(b)(2) or 29 U.S.C. § 1106(b) (3); (3) whether Defendants violated the specific Plan Document under 29 U.S.C. § 1104(a)(1)(D) by allowing some of the fees paid to Hewitt Associates to come from revenue-sharing arrangements; (4) whether Defendants violated the Plan documents by allowing some of the compensation for the Plan Trustee, State Street, to be paid from float; (5) whether allowing State Street to retain float constituted a prohibited transaction under 29 U.S.C. § 1106(a)(1)(D); (6) whether Defendants violated their duties of prudence and loyalty under § 1104(a)(1)(B) by doing any of the following: (a) selecting sector funds, especially the poorly-performing T. Rowe Price Science & Technology Fund, for inclusion in the Plan in 1999; (b) including a money market fund in the Plan rather than a stable value fund; and (c) structuring the Edison stock fund as a unitized fund instead of a direct ownership fund. The claims listed above were all dismissed against Defendants. (Orders, Docket Nos. 295, 303.) The Court also ruled that the applicable statute of limitations for Plaintiff's claims was six years, which runs back to August 16, 2001.[1] (July 16, 2009 Order at 12-14 [Docket No. 295].)

After the ruling on the summary judgment motions, two issues remained for trial: (1) whether

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[1] As stated above, Plaintiffs' initial Complaint was filed on August 16, 2007.

the Defendants violated their duty of loyalty by selecting for the Plan certain retail mutual funds that provided for favorable revenue-sharing arrangements but charged higher fees to Plan participants than other funds; and (2) whether the Defendants violated their duty of prudence by selecting for the Plan a money market fund that allegedly charged excessive management fees. In preparing for (and during) trial, the Plaintiffs amended their first theory of liability to conform to proof. Specifically, as to the mutual funds, Plaintiffs argued that Defendants violated both their duty of loyalty and their duty of prudence by investing in the retail share classes of six mutual funds instead of the institutional share classes of those same funds. The retail share classes of the six mutual funds offered more favorable revenue-sharing arrangements to SCE but charged the Plan participants higher fees than the institutional share classes. Three of the mutual funds at issue were chosen after the statute of limitations period; thus, Plaintiffs challenged Defendants' initial investment decisions with regard to those funds. The other three funds were added to the Plan before the statute of limitations period; thus, Plaintiffs challenged the failure to switch to an institutional share class upon the occurrence of certain significant events within the limitations period. Plaintiffs continued to assert the second theory of liability regarding the Money Market Fund.

A bench trial in this action was held on October 20-22, 2009. Additionally, the parties were permitted to file supplemental briefs, affidavits, and other

evidence in response to Plaintiffs' assertion at trial of a new legal theory regarding the selection of retail share classes rather than institutional share classes of certain mutual funds. The parties each submitted extensive post-trial briefing and additional evidence from November 2009 to April 2010. A post-trial hearing regarding the supplemental evidence was held on April 26, 2010.

Having throughly [sic] examined the evidence, considered the arguments of both sides, and made the following factual findings, the Court concludes that Defendants violated their duty of prudence under 29 U.S.C. § 1104(a) by choosing to invest in the retail share class rather than the institutional share class of the William Blair Small Cap Growth Fund, the MFS Total Return Fund, and the PIMCO (Allianz) RCM Global Tech Fund. The Court awards damages accordingly, as set forth below.

The Court concludes that Defendants did not breach their fiduciary duties of loyalty or prudence by failing to switch into the institutional share classes of the Berger (Janus) Small Cap Value Fund, the Allianz CCM Capital Appreciation Fund, and the Franklin Small-Mid Cap Value Fund upon the occurrence of certain events within the limitations period.

Finally, the Court finds that Defendants did not breach their fiduciary duty of prudence by investing in the Money Market Fund managed by State Street Global Advisors or by failing to negotiate a lower management fee.

II. FINDINGS OF FACT

A. Background

Plaintiffs Glenn Tibble, William Bauer, William Izral, Henry Runowiecki, Frederick Sohadolc, and Hugh Tinman, Jr. (collectively "Plaintiffs") are current or former employees of Midwest Generation, LLC. Midwest Generation, LLC is an indirect subsidiary of Edison Mission Group, Inc., which in turn, is a subsidiary of Defendant Edison International ("Edison International").

Defendant Edison International is the parent company of Southern California Edison ("SCE") (both entities referred to collectively as, "Edison"). SCE is a utility that provides electricity to retail customers in California. SCE is the sponsor of the Edison 401(k) Savings Plan ("the Plan"), formerly named the Stock Savings Plus Plan ("SSPP"). The Plan is a defined contribution plan, as defined by the Employee Retirement Income Security Act of 1974 as amended ("ERISA") § 3(34), 29 U.S.C. § 1002(34), and is an "eligible individual account plan." The Plan was created in 1982 and is maintained for all employees of Edison-affiliated companies. Edison employees may contribute from 1% to 85% of their eligible earnings to the Plan on a pre-tax basis, up to annual limits of the Internal Revenue Code, and Edison may match some contributions to the Plan. The Plaintiffs have been participants in the Plan during the relevant time period.

Defendant SCE Benefits Committee ("Benefits Committee") and its members are among the named fiduciaries of the Plan. The Benefits Committee is the Plan Administrator and is responsible for the overall structure of the Plan. Members of the Benefits Committee are chosen by the SCE Chief Executive Officer and are required to report to the SCE Board of Directors. The Secretary of the SCE Benefits Committee, a Defendant in this action, was a named fiduciary of the Plan during the relevant time period.[2]

Additionally, pursuant to the 2001 and 2006 Plan documents, SCE's Vice President of Human Resources and the Manager of SCE's Human Resources Service Center (now called "Benefits Administration"), both Defendants in this action, were named fiduciaries of the Plan during the relevant time period.[3] The Benefits Administration staff is responsible for implementing administrative changes to the Plan, overseeing the budget for Plan administration costs, and monitoring the ongoing performance of the Plan's recordkeeper, Hewitt Associates, LLC ("Hewitt Associates").

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[2] This named fiduciary status started in 2001. In 2005, Aaron L. Whitely was the Secretary of the SCE Benefits Committee.

[3] The named fiduciary status for these positions started in 2001. At different times, Diane Featherstone, Lillian R. Gorman, John H. Kelly, Frederick J. Grigsby, Jr., and J. Michael Mendez have served as SCE's Vice President of Human Resources or Senior Vice President of Human Resources.

Hewitt Associates has served as the third-party recordkeeper for the Plan since at least 1996. Hewitt Associates is responsible for preparing reports regarding the Plan to be sent to the Plan participants and regulators, and maintaining a system that participants can access to make changes to their contributions and investment elections.

The SCE and Edison International Board of Directors delegates the authority to select and monitor the Plan's investment options to the Edison International Trust Investment Committee (the "TIC"), a Defendant in this action. The TIC has delegated certain investment responsibilities to the TIC Chairman's Subcommittee (the "Sub-TIC"), which focuses on the selection of specific investment options. The TIC and the Sub-TIC (collectively referred to as "the Investment Committees") were Plan fiduciaries during the relevant time period. No members of the Investment Committees were simultaneously members of either the SCE or Edison International Board of Directors while serving on an Investment Committee.

To some extent and with certain exceptions, SCE indemnifies Defendants and SCE directors and employees for conduct when they may be acting as Plan fiduciaries.

B. Structure of the Plan

Before 1999, the Plan contained six investment options: (1) a Bond Fund invested in the Frank

Russell Short Term Bond Fund; (2) a Balanced Fund invested in five Frank Russell Trust Company funds; (3) a Global Stock Fund invested in three Frank Russell Trust Company funds; (4) a Money Market Fund invested in the Wells Fargo Short-Term Income Fund; (5) a Common Stock Fund invested in the Barclay's Global Investor's Equity Index T-Fund; and (6) the Edison International Stock Fund ("EIX Stock Fund").

In 1998, SCE and the unions representing SCE employees began collective bargaining negotiations. (SUF ¶ 10.) As a result of these negotiations, the investment options included in the Plan were altered significantly. After the negotiations were completed, the Plan offered a broad array of up to fifty investment options including ten "core" options and a mutual fund window, which included approximately forty mutual funds. In March 1999 and February 2000, the Plan was amended to provide for this structure of investment options for union and non-union employees of Edison and its affiliates. Since these changes, Plan participants have been allowed to select from a variety of investment options with different risk levels, including pre-mixed portfolios, a money market fund, bond and equity funds, the EIX Stock Fund, and dozens of mutual funds.

As of December 31, 2003, the Plan included 41 retail mutual funds. As of December 31, 2004, the Plan included 39 retail mutual funds. As of December 31, 2005, the Plan included 38 retail mutual funds.

The Plan had $2,128,870,558 in assets as of December 31, 2003; $2,655,515,479 in assets as of December 31, 2004; and $3,172,539,477 in assets as of December 31, 2005.

C. Investment Selection Process

As stated above, the TIC and the Sub-TIC (collectively, "the Investment Committees") have the authority to decide whether to select, maintain or replace the investment options in the Plan, so long as such choices are consistent with the overall structure of the Plan as described above. SCE's Investments Staff provides information and recommendations to the Investment Committees regarding which investment options to maintain or replace. The Investments Staff includes David Ertel, Marvin Tong, Greg Henry, Linda Macias, and Darleen Loose. This group is responsible for monitoring and evaluating the investments for the Plan, as well as the investments for other trusts monitored by Edison.

The Investments Staff does not have any authority over the administration of the Plan, the selection of the Plan's third-party service providers, or the selection of the Plan's investment options. Rather, the Investments Staff's role is limited to monitoring the Plan's investment options and, when needed, recommending to the Investment Committees that changes be made to the Plan's investment option line-up. On a quarterly basis, the Investments Staff attends the meetings of the Investment Committees and gives

presentations regarding the Plan's overall performance. When advisable, the Investments Staff presents information regarding the performance of specific investment options and recommends changes to the Plan's line-up, such as adding or terminating investment options. The Investment Committees have discretion to accept or reject the recommendations of the Investments Staff. In most instances, however, the Investment Committees accept the recommendations of the Investments Staff.

The Investments Staff uses the following criteria to evaluate the investment options in the Plan: (1) the stability of the fund's overall organization; (2) the fund's investment process; (3) the fund's performance; (4) the fund's total expense ratio (including fees and revenue-sharing); and (5) with respect to mutual funds, the availability of public information regarding the fund (collectively, the "Investment Criteria"). In applying the Investment Criteria, the Investments Staff evaluates fund performance on a net-of-fee basis to ensure that relative performance comparisons among funds may be made on a consistent basis.

The Investment Staff relies on a variety of sources to monitor the funds' performance and fees. Specifically, Hewitt Financial Services ("HFS"), an affiliate of the Plan's record-keeper Hewitt Associates, provides investment advice to the Investments Staff. HFS provides the Investment Staff with written reports regarding the performance of the Plan's investment options on a monthly, quarterly, and annual basis. The reports include short-and long-term

performance, annualized performance, risk, and performance of peer groups and benchmarks. The Investments Staff confers with HFS representatives to review the contents of the report on a quarterly basis, has an annual meeting with HFS to undergo a more in-depth analysis, and confers with HFS on an as-needed basis to discuss specific investment options.

Additionally, the Investments Staff confers with the Frank Russell Trust Company ("Russell") regarding fund performance. Russell is the investment consultant for Edison's Pension Fund, and at times has information regarding specific investment managers associated with the funds in the Plan's line-up or funds that are being considered by the Investments Staff.

The Investments Staff also conducts its own independent analysis regarding the performance of the investment options. This research includes using data from Morningstar, Financial Engines, and other online sources to track the options' performance. The Investments Staff, in conjunction with HFS and Russell (for the funds managed by Russell) also selects benchmarks for each investment option to determine if the investment options are meeting the Investment Criteria.

If an investment option's performance or a change in management or deterioration in financial condition suggests that the option may cease to meet the Investment Criteria in the future, the Investments

Staff places the fund on a "Watch List" for closer monitoring. If an option on the Watch List fails to meet the Investment Criteria, the Investments Staff will recommend to the Investment Committees that the option be removed from the Plan line-up. In these instances, the Investments Staff often recommends adding a new option to the Plan in the place of the terminated option.

When a new option needs to be added to the Plan, the Investments Staff requests that HFS identify a small number of investment funds that would meet the Plan's needs. Additionally, the Investments Staff conducts independent research to choose a new option to recommend to the Investment Committees. Generally, however, the Investments Staff does not recommend that the Investment Committees make changes (either additions and deletions) to the Plan line-up unless there are significant issues with a particular Plan investment option such that it no longer meets the Investment Criteria.

After the recommendations are made to the Investment Committees during the quarterly meetings, the Investment Committees may ask questions about the recommendations. Ultimately, the Investment Committees decide whether to accept or reject the Investments Staff's recommendations in their discretion.

Changes to the Plan's investment line-up are generally only made once or twice per year. Between August 2001 and the end of 2005, changes to the

Plan's investment lineup occurred on: July 2002, October 2003, December 2003, October 2004, January 2005, and October 2005.

D. Mutual Funds

As stated above, the Plan began offering a mutual fund window to Plan participants in March 1999 in response to collective bargaining negotiations. At any given time, the Plan's mutual fund window consisted of approximately 40 retail mutual funds for participants to choose from.

1. Revenue Sharing

Before the addition of the mutual funds to the Plan in 1999, SCE paid the entire cost of Hewitt Associates' record-keeping services. These services include things such as mailing prospectuses, maintaining individual account balances, providing participant statements, operating a website accessible by Plan participants that allows participants to conduct transactions and obtain information about the Plan's investment options, and answering inquiries from Plan participants regarding their investment options. The fees for these services were paid by SCE, not the Plan participants.

With the addition of the mutual funds to the Plan, however, certain "revenue sharing" was made available to SCE that could be used to offset the cost of Hewitt Associates' record-keeping expenses. "Revenue

sharing" is a general term that refers to the practice by which mutual funds collect fees from mutual fund assets and distribute them to service providers, such as recordkeepers and trustees-services the mutual funds would otherwise provide themselves.[4] Revenue sharing comes from so-called "12b-1" fees, which are fees that mutual fund investment managers charge to investors in order to pay for distribution expenses and shareholder service expenses. *See Meyer v. Oppenheimer Mgmt. Corp.*, 895 F.2d 861, 863 (2d Cir. 1990).[5] Each type of fee is collected out of the mutual fund assets, and is included as a part of the mutual fund's overall expense ratio. (*See* Pomerantz Rep. ¶ 2.) The expense ratio is the overall fee that the mutual fund charges to investors for investing in that particular fund, which includes 12b-1 fees as well as

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[4] In a recent report from the Department of Labor ("DOL"), the Working Group noted that "in the employee benefit community, the term 'revenue sharing' is used loosely to describe virtually any payment that a plan service provider receives from a party other than the plan." Report of the Working Group on Fiduciary Responsibilities & Revenue Sharing Practices, Department of Labor (June 18, 2009), *available at*, http: www.dol.gov/ebsa/publications/AC-1107b.html.

[5] 12b-1 fees receive their name from SEC Rule 12b-1, which was promulgated pursuant to the Investment Company Act of 1940 ("ICA"). *See* 17 C.F.R. § 270.12b-1(b). The ICA generally bans the use of fund assets to pay the costs of fund distribution. In 1980, however, the SEC adopted Rule 12b-1 which specifies certain conditions that must be met in order for mutual fund advisers to be able to make payments from fund assets for the costs of marketing and distributing fund shares. *See Meyer*, 895 F.2d at 863.

other fees, such as management fees.[6] These fees are deducted from the mutual fund assets before any returns are paid out to the investors.

In 1999, when retail mutual funds were added to the Plan, some of the mutual funds offered revenue sharing which was used to pay for part of Hewitt Associates' record-keeping costs. Hewitt Associates then billed SCE for its services after having deducted the amount received from the mutual funds from revenue sharing. In short, revenue sharing offsets some of the fees SCE would otherwise pay to Hewitt Associates.

The use of revenue sharing to offset Hewitt Associates' record-keeping costs was discussed with the employee unions during the 1998-99 negotiations. Specifically, the unions were advised that revenue sharing fees would result in some of the administrative costs of the Plan being partially offset from mutual funds' revenue sharing payments to Hewitt Associates. Additionally, this arrangement was disclosed to Plan participants on approximately seventeen occasions after the practice began in 1999.

The SCE Human Resources Department, also called "Benefits Administration," is responsible for the overall administration budget for the Plan, including the expenses associated with Hewitt Associate's

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[6] *See* Fact Sheet: Report on Mutual Fund Fees & Expenses, Securities & Exchange Commission (January 10, 2001), *available at* http://www.sec.gov/news/extra/mfeefaq.htm.

record-keeping costs. The amount of revenue sharing affects the overall budget for the Plan. The Human Resources Department has no authority to determine which funds are selected for the Plan line-up, but needs to know what revenue sharing arrangements exist so as to budget accordingly.

2. Investment Decisions Were Not Motivated by a Desire to Increase Revenue Sharing

a. Overall trend toward reduced revenue sharing

From July 2002 to October 2008, the investment selections for the Plan demonstrate a general trend toward selecting mutual funds with **reduced** revenue sharing. During this period, Defendants made 39 additions or replacements to the mutual funds in the Plan's investment line-up. In 18 out of 39 instances, Defendants chose to replace an existing mutual fund that offered revenue sharing with a mutual fund that provided **less** revenue sharing or **no** revenue sharing at all. In 11 instances, Defendants made mutual fund replacements that resulted in no net change to the revenue sharing received by SCE. In 4 instances, Defendants added additional funds that did not replace existing funds; thus, there is no comparison to be made with regard to revenue

sharing.[7] In sum, in 33 out of 39 instances, the changes to the mutual funds in the Plan evidenced either a decrease or no net change in the revenue sharing received by the Plan. These changes could not have been motivated by a desire to capture revenue sharing. In contrast, in only 6 instances out of 39, Defendants made mutual fund replacements that increased the revenue sharing received by SCE. This overall pattern is not consistent with a motive to increase revenue sharing.

b. Plan changes in 2003 were not motivated by a desire to capture more revenue sharing

Between March and June 2003, members of the Investments Staff were considering changes to the Plan's mutual fund line-up. Members of the Investment Staff, such as Marvin Tong and David Ertel, had email conversations with advisors from HFS and members of the SCE Human Resources Department in which they discussed the revenue sharing that SCE could expect to receive from the fund changes the Investments Staff was considering. These email conversations indicate that the Investments Staff was certainly aware of the benefits of revenue sharing; however, the actual changes made to the Plan line-up

[7] Of these four additions, however, two of the mutual funds did not offer any revenue sharing, while the other two did offer revenue sharing.

during 2003 do not evidence a desire to increase revenue sharing.

On June 30, 2003 and again on July 16, 2003, the Investments Staff attended meetings with the Investment Committees regarding the recommended changes to the Plan's investment line-up. During those meetings, the Investments Staff did not make any recommendations to the Investment Committees regarding revenue sharing. In fact, the Investment Staff recommenced adding six mutual funds to the Plan at the 2003 meetings. Each of the six funds had both a retail share class and an institutional share class with different expense ratios and different revenue sharing benefits. With regard to each of those six funds added to the Plan, the Investment Committees selected the share class with the lowest expense ratio and the lowest revenue sharing, with the exception of one fund which offered no revenue sharing in either share class. In sum, the 2003 changes were not motivated by a desire to capture revenue sharing.

Additionally, there is no evidence that Defendants were motivated by revenue sharing when deciding to add or retain the six specific mutual fund share classes at issue in this case, as discussed further below.

3. Mutual Fund Share Classes

Certain mutual funds offer their investors retail and institutional share classes. Institutional share

classes are available to institutional investors, such as 401(k) plans, and may require a certain minimum investment. Institutional share classes often charge lower fees (i.e., a lower expense ratio) because the amount of assets invested is far greater than the typical individual investor. The investment management of all share classes within a single mutual fund is identical, and managed within the same pool of assets. In other words, with the exception of the expense ratio (including revenue sharing), the retail share class and the institutional share class are managed in identical fashion.

4. The Six Mutual Funds At Issue

Plaintiffs contend that Defendants violated their fiduciary duties of loyalty and prudence by investing in the retail share classes rather than the institutional share classes of the following six mutual funds: (1) Janus Small Cap Value Fund ("Janus Fund"); (2) Allianz CCM Capital Appreciation Fund ("Allianz Fund"); (3) Franklin Small-Mid Cap Growth Fund ("Franklin Fund"); (4) William Blair Small Growth Fund ("William Blair Fund"); (5) PIMCO RCM Global Tech Fund ("PIMCO Fund"); and (6) MFS Total Return A Fund ("MFS Total Return Fund"). The retail share classes of each of these funds had higher expense ratios than the institutional share classes; the higher fees were directly related to the fact that the retail share classes offered more revenue sharing.

a. William Blair Small Cap Growth Fund

The William Blair Small Cap Growth Fund ("William Blair Fund") was initially added to the Plan in July 2002. Defendants chose to invest in a retail share class of the fund, although an institutional share class was available at that time. There is no evidence that Defendants considered the institutional share class in July 2002 or that the Investments Staff presented information about the institutional share class to the Investment Committees in 2002. From 2002 to 2009, the fees for the retail share class of the William Blair Fund were 24-29 basis points higher than the fees for the institutional share class. The higher fee is attributable to 12b-1 fees that served as a source of revenue sharing to SCE.

The Plan's initial investment in the William Blair Fund was $0. The minimum required investment for the institutional share class was $500,000. Nonetheless, the $500,000 investment minimum for the institutional share class would not have precluded Defendants from investing in the institutional share class. The William Blair Fund will waive the investment minimum in certain circumstances – for example, where a plan can commit to meet the investment minimum within a specified time frame. Here, the Plan's investment in the William Blair Fund met or exceed [sic] the $500,000 minimum investment criteria by August 2002, within a month of its initial investment.

For large 401(k) plans with over a billion dollars in total assets, such as Edison's, mutual funds will often waive an investment minimum for institutional share classes. It is also common for investment advisors representing large 401(k) plans to call mutual funds and request waivers of the investment minimums so as to secure the institutional shares. Defendants' expert, Daniel J. Esch, has personally obtained such waivers for plans as small as $50 million in total assets – i.e., 5 percent the size of the Edison Plan.

The only way a fiduciary can obtain a waiver of the investment minimum is to call and ask for one. Yet none of the Edison fiduciaries nor anyone acting on their behalf (including HFS) ever requested that the William Blair Fund waive the minimum investment so that the Plan could invest in the institutional share class. Had someone called on behalf of the Plan and requested a waiver of the investment minimum, the William Blair Fund almost certainly would have granted the waiver.

The William Blair Fund remains in the Plan to the present day; assets continue to be invested in the retail share class.

b. PIMCO RCM Global Technology Fund

The PIMCO RCM Global Technology Fund ("PIMCO Fund") was added to the Plan in July 2002. Defendants initially chose to invest in the retail share

class, although an institutional share class existed at that time. From 2002 to 2003, the fees for the retail share class were 34-40 basis points higher than the fees for the institutional share class. The higher fee is attributable to 12b-1 fees that served as a source of revenue sharing to SCE.

In July 2002, the minimum investment for the institutional share class of the PIMCO Fund was $5 million. The Plan did not meet this minimum investment until July 2003, when the assets in the fund totaled $5.3 million.

Nonetheless, the $5 million investment minimum for the institutional share class would not have precluded Defendants from investing in the institutional share class. The PIMCO Series Prospectus filed on December 28, 2001 indicates that the PIMCO Fund will waive investment minimums for the institutional share class in its sole discretion. As stated above, it is common for investment advisors representing large 401(k) plans to call mutual funds and request waivers of the investment minimums so as to secure the institutional shares. Defendants' expert has personally obtained such waivers for plans as small as $50 million in total assets – i.e., 5 percent the size of the Edison Plan. Additionally, Defendants' expert has personally obtained waivers for plans like Edison's from the PIMCO Fund in the past.

None of the Edison fiduciaries nor anyone acting on their behalf (including HFS) ever requested that the PIMCO Fund waive the minimum investment so

that the Plan could invest in the institutional share class in July 2002. Had someone called on behalf of the Plan in July 2002 and requested a waiver of the investment minimum, the PIMCO Fund almost certainly would have granted the waiver.

In October 2003, Defendants converted the shares in the retail class of the PIMCO Fund to the institutional share class. The following background is relevant to the decision to switch share classes: In 2002, when Defendants first considered adding the PIMCO RCM Fund to the Plan, it was called the Dresdner RCM Global Technology Fund (the "Dresdner Fund"). The retail share class of the Dresdner Fund had a performance history and a Morningstar rating. However, in the time between when the Investments Staff first recommended the Dresdner Fund to the Investment Committees, and when the fund was added to the Plan in July 2002, there was merger of the Dresdner Fund into the PIMCO RCM Global Technology Fund. At that point, the assets automatically transferred from the retail share class of Dresdner Fund into the retail share class of the PIMCO RCM Global Technology Fund. The retail share class of PIMCO Fund did not have a Morningstar rating or a performance history.

In early 2003, Edison began considering the elimination of a separate fund, the T. Rowe Price Science Fund, from the Plan. The T. Rowe Price Science Fund had over $40 million in assets invested in it; Defendants considered mapping these assets into the PIMCO Fund upon the termination of the

T. Rowe Price Science Fund. In connection with that decision, Defendants reviewed the different share classes of the PIMCO Fund in July 2003. Defendants learned that the retail share class of the PIMCO Fund (in which the Plan was invested) did not have a performance history or a Morningstar rating, but the institutional share class did have a performance history and a Morningstar rating. One of the Investment Criteria used to select mutual funds is the availability of public information, such as a sufficient performance history and Morningstar rating. Thus, the Edison fiduciaries determined that it would be more prudent to invest in the institutional share class of the PIMCO Fund.

In October 2003, when the Edison fiduciaries eliminated the T. Rowe Price Science Fund from the Plan, they mapped the $40 million in assets from that fund into the PIMCO Fund and simultaneously converted all of the PIMCO Fund retail shares to institutional shares, thereby securing the lower fee rate. Since October 2003, the shares have been invested in the institutional share class.

c. MFS Total Return Fund

The MFS Total Return Fund was added to the Plan in July 2002. The fund was added as a replacement for the Invesco Total Return Fund. Assets in the amount of $500,000 were mapped from the Invesco Total Return Fund into the MFS Total Return Fund when the fund was first added to the

Plan. Defendants chose to invest in the retail share class of the fund, although a cheaper institutional share class was available in July 2002. From 2002 to 2008, the fees for the retail share class were 24-25 basis points higher than the fees for the institutional share class. The higher fee is attributable to 12b-1 fees that served as a source of revenue sharing to SCE.

David Ertel admitted that the Investment Staff did not present any information to the Sub-TIC about the institutional share class of the MFS Total Return Fund at the time it was added to the Plan.

In July 2002, to invest in the institutional share class of the MFS Total Return Fund, a retirement plan had to: (1) have aggregate assets of at least $100 million, and (2) invest at least $10 million either in institutional shares of the MFS Total Return Fund alone or in combination with investments in institutional shares of other MFS funds. There is no evidence as to what the applicable minimum investment for the institutional share class was in 2003, 2004, 2005, 2006, or 2007.[8]

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[8] Plaintiffs introduced a document at trial dated December 31, 2008, which demonstrated that, as of that date, the mandatory minimum investment for the institutional share class of the MFS Total Return Fund was $0. (Trial Exh. 1742.) However, this exhibit has no probative value because it does not indicate what the investment minimum was at the time Edison fiduciaries added the Fund to the Plan line-up, or at any time when Edison was invested in the fund.

The Plan met the first criteria for investment in the institutional share class – aggregate assets of at least $100 million – at the time of its initial investment in July 2002. As to the second criteria, the Plan never had a total of $10 million in assets invested in the MFS Total Return Fund alone. However, as of April 2005, the Plan met the minimum investment requirement through a combination of assets in various MFS funds which exceeded $10 million.

The $10 million investment minimum for the institutional share class would not have precluded Defendants from investing in the institutional share class of the MFS Total Return Fund. The January 2002 MFS Series Prospectus states that MFS Total Return Fund will waive the investment minimum in its discretion when it determines that the entity's aggregate assets were likely to equal or exceed $100 million or that such entity would make additional investments in MFS funds so as to meet the $10 million aggregate minimum within a reasonable time.

For large 401(k) plans with over a billion dollars in total assets, such as Edison's, mutual funds will often waive an investment minimum for institutional share classes. It is therefore common for investment advisors representing large 401(k) plans to call mutual funds and request waivers of the investment minimums so as to secure the institutional shares. Defendants' expert has personally obtained such waivers for plans as small as $50 million in total assets – i.e., 5 percent the size of the Edison Plan.

The only way a Plan fiduciary can obtain a waiver of an investment minimum for the institutional share class is to call the fund and ask for one. Yet none of the Edison fiduciaries nor anyone acting on their behalf (including HFS) ever requested that the MFS Total Return Fund waive the minimum investment so that the Plan could invest in the institutional share class. Had someone called on behalf of the Plan and requested a waiver of the investment minimum in July 2002, the MFS Total Return Fund almost certainly would have granted the waiver.

The MFS Total Return Fund was eliminated from the Plan's menu of investment options in October 2008, and its assets were mapped into the Russell Balanced Moderate Growth portfolio at that time.

d. Janus Small Cap Value Fund

The Berger Small Cap Value Fund was added to the Plan in March 1999, which is outside the statute of limitations period in this action. Defendants chose to invest in the retail share class although an institutional share class was also available. Defendants do not offer any reason why they initially chose to invest in the retail share class. From 2003 to 2007, the fees for the retail share class were between 18 and 33 basis points higher than the fees charged for the institutional share class. The higher fee is attributable to 12b-1 fees that served as a source of revenue sharing to SCE.

Effective in April 2003, Stilwell Financial, which owned both the Janus and Berger families of mutual funds reorganized several of Berger's funds into Janus. As part of this reorganization, the name of the Berger Small Cap Value Fund was changed to Janus Small Cap Value Fund (the "Janus Fund"). David Ertel, the Manager of Investments for SCE and the head of the Investments Staff, admitted that the April 2003 rebranding did not prompt Edison to review the share class in which the Plan assets were invested in.

The management team of the Janus Fund remained the same both before and after the 2003 reorganization. Specifically, the Janus Fund was managed by a sub-advisor company called Perkins, Wolfe, and McDonald ("PWM") both before and after the acquisition. The same two managers from PWM, Robert Perkins and Thomas Perkins, continued to manage the fund after the acquisition. During the acquisition, however, Janus purchased a minority interest of 30 percent in PWM.

The investment style of the Janus Fund remained essentially the same both before and after the 2003 reorganization, and the benchmark that the fund used, the Russell 2000 Value Index, did not change. Further, Morningstar, which is a trusted source for information on mutual funds, did not change its categorization of the Janus Fund nor did it change the benchmarks it used to evaluate the Janus Fund. In sum, the changes to the Janus Fund in April 2003 were nothing more than a rebranding. The

fund's management, investment style, and performance benchmarks did not change.

On June 30, 2003, the Trust Investment Committee/ Chairman's Subcommittee ("Sub-TIC") held a meeting in which they reviewed the funds for the Plan, including the Janus Fund. The meeting minutes/ overview for the June 30, 2003 meeting reflect that, as of that date, the Janus Fund was placed on a "low priority" Watch List due to "Organizational issues/ Manager turnover." Thus, Defendants conducted a closer review of the Janus Fund as a result of the April 2003 reorganization. Defendants did not switch share classes in 2003.

In October 2007, the Janus Fund was eliminated from the Plan's line-up of investment options and its assets were mapped into the Artisan Small Cap Value Fund.

e. Allianz CCM Capital Appreciation Fund

The PIMCO CCM Capital Appreciation Fund was added to the Plan in March 1999, which is outside the statute of limitations period for this action. Defendants chose to invest in a retail ("Administration") share class of the fund, although an institutional ("I") share class was available and continues to remain available. Defendants do not offer any reason why they initially chose to invest in the retail share class. From 2005 to 2009, fees for the retail share class were 25 basis points higher than fees for the

institutional share class. The higher fee is attributable to 12b-1 fees that served as a source of revenue sharing to SCE.

In 2000, Allianz bought a controlling interest in PIMCO. Five years later, in April 2005, Allianz rebranded several of the PIMCO funds. The PIMCO RCM Capital Appreciation Fund was renamed the Allianz CCM Capital Appreciation Fund (the "Allianz Fund") at that time. There was no change in the management of the Allianz Fund as a result of the rebranding.[9] Additionally, the fund's investment strategy remained the same, and Morningstar did not reclassify the Allianz fund or change its benchmarks after the April 2005 rebranding.

In June 2005, the Sub-TIC held a meeting in which they reviewed the funds for the Plan, including the Allianz Fund. The meeting minutes from the June 2005 meeting indicate that the Allianz Fund was placed on a "low priority" Watch List due to "manager turnover" and "performance issues." Thus, Defendants performed a closer review of the Allianz Fund

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[9] Plaintiffs point out that, as a result of the April 2005 rebranding, Allianz removed one of PIMCO's "star" fund managers, William Gross, from several of their funds. (Pl. Response to Def.'s Supp. Br. at 17.) However, William Gross did not manage the PIMCO CCM Capital Appreciation Fund at any relevant time. Moreover, Gross was a fixed-income manager, while the Allianz Fund is an equity fund. Thus, Gross's departure from the management of some of PIMCO's funds is not material to whether Defendants should have conducted a due diligence review of the Allianz Fund in 2005.

in connection with the April 2005 rebranding.[10] Defendants did not switch share classes in April 2005.

The Allianz Fund remains in the Plan to the present day; assets continue to be invested in the retail share class.

f. The Franklin Small-Mid Cap Growth Fund

The Franklin Small Cap Growth Fund was added to the Plan in March 1999, which is outside the statute of limitations period for this action. Defendants chose to invest in a retail ("A") share class although an institutional ("Advisor") share class was available at that time and continues to remain available. Defendants chose to invest in the retail share class in 1999 because the institutional share class had an inception date of 1997 and did not have a Morningstar rating or three years of performance history. Conversely, the retail share class had a Morningstar rating and significant performance history. Given that the availability of public information for mutual funds, including a Morningstar rating and significant performance history, is one of the five Investment Criteria, Defendants chose to

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[10] It should be noted that the PIMCO CCM Capital Appreciation Fund had been placed on a medium-low priority Watch List as of March 2003 due to "performance issues." The record is not clear whether the fund simply remained on the Watch List throughout 2003-2005, or if the fund had been removed from the Watch List only to return in April 2005.

invest in the retail share class rather than the institutional share class so as to capture the Morningstar rating and the performance history.

From 2001 to 2007, the fees for the retail share class of the Franklin Fund were 25 basis points higher than the fees for the institutional share class. The higher fee is attributable to 12b-1 fees that served as a source of revenue sharing to SCE.

On September 1, 2001, there was a change in the investment criteria of the Franklin Fund. Prior to that time, the Franklin Fund invested in growth companies with market capitalizations up to 1.5 billion except for companies in the fund's Russell 2000 benchmark. After September 2001, the Franklin Fund could invest in companies with market capitalizations up to $8.5 billion. The fund also expanded its main investment strategy, so that it could invest up to 80% of its net assets in small capitalization and mid capitalization growth companies. In short, the fund changed from a small-cap fund to a small-mid-cap fund. As a result of this change, in September 2001, the retail shares that Edison previously held in the Franklin Small Cap Growth Fund were automatically converted into retail shares of the Franklin Small-Mid Cap Growth Fund.

The initial managers of the Franklin Fund before the September 2001 change – Edward Jamieson, Michael McCarthy, and Aidan O'Connell – remained as the core management of the fund after the change. Two additional managers were added to the fund's

management team in 2002. Morningstar did not reclassify the Franklin Fund after the change in investment strategy.

The SCE Investments Staff, in consultation with HFS, reviewed the Franklin Fund after the September 2001 change and concluded that the fund still satisfied the Investment Criteria. The Investments Staff recommended that the Franklin Fund be reclassified as a mid-cap growth fund for the Plan's purposes. On January 28, 2002, at the meeting of the Sub-TIC, the Investments Staff recommended reclassifying the fund as a mid-cap fund and adding the William Blair Small Cap Fund so as to have a small-cap fund in the mix of options for the Plan participants. The recommendations were adopted. Edison also changed its participant communications to advise the Plan participants that the Franklin Small-Cap Growth Fund would now be categorized as a "Medium U.S. Stock Fund." The Franklin Fund was not put on the Watch List as a result of the September 2001 change. No new shares were added to the Franklin Fund as a result of the change, nor did Defendants switch share classes.

The Franklin Fund was eliminated from the Plan in October 2007 and its assets were mapped into the T. Rowe Price Mid-Cap Growth Fund.

E. Money Market Fund

One of the funds in the Plan is a short-term investment fund (the "Money Market Fund") which,

since 1999, has been managed by State Street Global Advisors ("SSgA").[11] SSgA is a division of State Street Bank and Trust Company ("State Street"), which is also the Plan's Trustee. In 1999, State Street, though [sic] its SSgA division, was awarded the money market business as part of the Plan's decision to hire State Street as the Trustee for the Plan. At that time, State Street charged 18 basis points (0.18%) in management fees for the Money Market Fund.

Management fees for the Money Market Fund are not paid by SCE; rather, management fees are charged against Plan participants' fund assets as part of the expense ratio.

1. Selection of the State Street Money Market Fund

Prior to hiring State Street and selecting the Money Market Fund, David Ertel ("Ertel") of the Investments Committee reviewed four other money market funds sometime in 1998. Each of the four funds charged management fees ranging from 15 to 20 basis points. On or about the same time, SCE sent out a Request for Proposal ("RFP") to select a Trustee for the Plan. Ertel recommended that SCE hold off on

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[11] In general, a money market fund is a conservative investment vehicle that often invests in short-term money market securities, such as short-term securities of the United States Government or its agencies, bank certificates of deposit, and commercial paper. *See Jones v. Harris Associates L.P.*, Slip opinion, Case No. 08-586, at 9 n.6 (S.C. Mar. 30, 2010)

selecting a money market fund until such time as the results from the RFP were received, as many of the RFP candidates also offered short-term investment funds.

As a result of the RFP, SCE received seven responses from various candidates for the Trustee position. SCE formed an Oversight Group consisting of members from SCE's Human Resources Department, the Treasurer Department, Controllers, and the outside record keeper, Hewitt Associates, to review the responses to the RFP and narrow the options to the top three candidates. Ertel was part of the Oversight Group. The top three candidates for the Trustee position were Wells Fargo Bank, the Northern Trust Co., and State Street Bank, all of which provided short-term investment funds which they managed. Each of the three top candidates charged management fees for their money market funds ranging from 15 to 20 basis points. Specifically, Wells Fargo Bank charged fees of 20 basis points, North Trust Co. charged 15 basis points, and State Street charged fees of 18 basis points.[12] State Street was ultimately selected as the Trustee in 1999, and the

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[12] Additionally, the Trustee candidates that were not chosen as the top three candidates also charged management fees ranging from 15 to 20 basis points for their short-term investment funds. Specifically, the Bank of New York and the Mellon Trust both charged fees of 20 basis points for short-term investment funds they managed, while Wachovia Bank charged fees of 15 basis points.

Plan decided to invest in the money market fund managed by SsgA.

2. Monitoring of the Money Market Fund

The Investments Staff consistently monitors the performance of all the funds in the Plan, including the Money Market Fund. As part of this process, the Investments Staff receives monthly, quarterly, and annual reports from HFS discussing the Money Market Fund's performance. The Investment Staff evaluates the Money Market Fund on the same Investment Criteria with which it evaluates other funds, which include: (1) the stability of the fund's overall organization; (2) the fund's investment process; (3) the fund's performance compared to benchmarks and peer groups; and (4) the fund's total expense ratio (fees). The most important criterion is the Money Market Fund's performance net of fees as compared to peers and benchmarks.

At the time the Money Market Fund was chosen, Ertel evaluated the performance of the fund, including SsgA's fees, and found that the 18 basis-point fee was reasonable.

In January 2003, Marvin Tong ("Tong") joined the Investments Staff at SCE. He reports directly to Ertel and is one of the persons responsible for monitoring the investment options in the Plan. Tong spends approximately 50% of his time working on the Plan. Prior to working at SCE, Tong had worked in the

investment consulting field, consulting 401(k) plans and pension plans. When he started at SCE, he reviewed the fees of all the options in the Plan, including the Money Market Fund. Based on his experience, Tong believed that the 18 basis-point fee for the Money Market Fund was reasonable at that time.

In late 2004, Pamela Hess ("Hess") joined the team at HFS that provides investment support services to SCE. Prior to that time, Hess worked as a Senior Investment Consultant at HFS from 2000 to 2005, and an Investment Analyst at HFS from 1999-2000. In 2004, when she began working with SCE, Hess believed that the 18 basis-point fee for the Money Market Fund was reasonable in light of the size of the Plan's investment in the fund and the services rendered by State Street to the Plan.

Hess often reviewed the fees for the Money Market Fund and alerted the SCE Investment Staff of opportunities to seek lower fees when they arose. In 2005, Hess had a conversation with Tong regarding the management fees of the Money Market Fund. Hess told Tong that she had reviewed the fees for the Money Market Fund and believed that the Plan had an opportunity to negotiate a lower fee, in light of the fact that the Plan's assets in the fund had grown. Tong, in turn, discussed Hess's suggestion with Ertel. Ertel authorized Tong to discuss the issue with SCE's Benefits Accounting Staff to attempt to negotiate the Money Market Fund fees with State Street.

There is no evidence in the record that Tong actually discussed the matter with the Benefits Accounting staff or that persons from the Benefits Accounting Department contacted State Street in 2005 regarding lowering the fees for the Money Market Fund. Nonetheless, in September 2005, SSgA dropped its fees from 18 basis points to 12 basis points. It is unclear whether SSgA or SCE initiated the reduction in fees.

In April 2007, Tong again discussed the reasonableness of the fees for the Money Market Fund with Hess. Hess told Tong that she had reviewed the fees for the Money Market fund, and that because the assets in the fund had grown to $440 million, she believed SCE could negotiate a lower management fee with SSgA. Hess stated that "true pricing" would lie somewhere between 8 to 9 basis points, and that Barclays Global Investments offered a "collective version" money market fund for 9 basis points.[13] Hess also pointed out that she believed Vanguard had "low cost vehicles" at 9 basis points. Hess also stated that she did not believe SCE was overpaying with SSgA; rather, she felt that because two years had gone by since the last reduction in fees, and SCE's assets continued to grow, SCE might be in a position to negotiate lower fees. At that time, Hess was aware of

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[13] Hess described a "collective version" as similar to a private mutual fund. A collective money market fund is not publicly traded; rather, it is available only to ERISA-qualified investors and other 401(k) investors.

a number of other comparable 401(k) plans that offered their participants money market funds with fees of 12 basis points or higher. In other words, the 12 basis-point fee charged by SSgA was comparable to what other 401(k) plans were paying at the time, in Hess's experience.

In response to Hess's information, Tong contacted the SCE Benefits Accounting staff, and together they negotiated with State Street a [sic] for a reduction in the investment management fee. Consequently, in July 2007, SSgA reduced the fees for the Money Market Fund from 12 basis points to 10 basis points. In October 2007, the management fees for the Money Market Fund were further reduced to 8 basis points. Currently, fees for the Money Market Fund remain at 8 basis points.

From 1999 to the present, the SCE Investment Staff has regularly monitored the performance, net of fees, of the Money Market Fund. Throughout this period, the Money Market Fund has consistently exceeded its performance benchmarks, net of fees, in a statistically significant manner.

Despite the Money Market Fund's consistently good performance, in 2008, in response to the global financial crisis, the Investment Committees requested that the Investments Staff conduct an extensive review of the Money Market Fund. The goal of the review was to ensure that the Investment Committees were comfortable with the Money Market Fund's management and credit risk. During this review,

members of the Investments Staff had discussions with SSgA and HFS regarding the performance of the Money Market Fund. Based on the results of the investigation, in early 2009, the Investment Committees took no action regarding the Money Market Fund, as it continued to meet the Investment Criteria and outperform its benchmarks. Further, HFS found that the management fee of 8 basis points was reasonable and competitive when compared with similar funds; in fact, it was one of the lowest fees offered for that type of fund in the market.

III. CONCLUSIONS OF LAW

A. Jurisdiction

The Court has federal question subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1331 and 29 U.S.C. § 1132(e)(1). The Plan, formerly named the SSPP, is a "defined contribution plan," and an "eligible individual account plan" as defined by ERISA § 3(34), 29 U.S.C. § 1002(34). Each of the named Plaintiffs were participants in the Plan at the time the action was commenced and remain participants in the Plan within the meaning of ERISA §§ 3(7) and (8), 29 U.S.C. §§ 1002(7) and (8). The Plan is covered by and subject to the provisions of part 4 of Title I of ERISA, § 401 *et seq.*, 29 U.S.C. § 1101 *et seq.*

Venue is proper in this Court pursuant to 29 U.S.C. § 1132(e)(2) because the Plan is administered in this District and the Defendants may be found in this District.

B. Standing

ERISA §§ 502(a)(2) and (a)(3), 29 U.S.C. §§ 1132(a)(2) and (a)(3), provide standing for any participant to assert, on behalf of the Plan, a breach of fiduciary duty claim under ERISA § 409, 29 U.S.C. § 1109. *Concha v. London,* 62 F.3d 1493, 1499 (9th Cir. 1995). Defendants do not challenge the named Plaintiffs' status as participants of the Plan within the meaning of 29 U.S.C. §§ 1132(a)(2) or (a)(3). *See also* 29 U.S.C. § 1002(7) and (8) (definition of participant); *Firestone Tire & Rubber Co. v. Bruch,* 489 U.S. 101, 117 (1989) ("participant" means either employees currently in covered employment or "former employees who 'have a reasonable expectation of returning to covered employment' or who have a 'colorable claim' to vested benefits. .') (quoting *Kuntz v. Reese,* 785 F.2d 1410, 1411 (9th Cir. 1986)).

ERISA § 409(a) provides that, "[a]ny person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter shall be personally liable to make good to such plan any losses to the plan resulting from such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate ". 29 U.S.C. § 1109(a). Claims under ERISA § 409 are brought in a representative capacity on behalf of the plan as a whole. *See In re First American Corp. ERISA Litig.,* 258 F.R.D. 610, 615 (C.D. Cal. 2009)

("[T]he text of § 409(a) characterizes the relevant fiduciary relationship as one 'with respect to a plan,' and repeatedly identifies the 'plan' as the victim of any fiduciary breach. 'A fair contextual reading of the statute makes it abundantly clear that its draftsman were primarily concerned with the possible misuse of plan assets, and with remedies that would protect the entire plan, rather than the rights of an individual beneficiary.'") (quoting *Massachusetts Mutual Life Ins. Co. v. Russell*, 473 U.S. 134, 140 (1985)); *Kanawi v. Bechtel Corp.*, 254 F.R.D. 102, 110 (C.D. Cal. 2008) ("The complaint [alleging breach of fiduciary duties] is based on allegations and recovery that address the Plan as a whole, not individual claimants. If recovery is received and paid to the Plan, it is the responsibility of the Plan fiduciaries to determine the manner in which such recovery will be applied.") Here, as in *In re First American* and *Kanawi*, the Plaintiffs' claims assert harm to the Plan as a whole, not to their individual accounts. As participants in the Plan, Plaintiffs may challenge the alleged breaches of duty on behalf of the Plan. 29 U.S.C. § 1132(a)(2) and (a)(3); *see Concha*, 62 F.3d at 1500.[14]

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[14] Plaintiffs also have Article III standing to challenge Defendants' alleged breaches of duty. Article III standing requires Plaintiffs to show: (1) an injury in fact; (2). a causal connection between the injury and the actions complained of; and (3) redressability. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). As explained below, Plaintiffs have shown that the Plan suffered a loss and that Defendants' conduct was

(Continued on following page)

C. Legal Standard: Breach of Fiduciary Duty

ERISA is intended to "promote the interests of employees and their beneficiaries in employee benefit plans." *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 90 (1983). In enacting ERISA, "the crucible of congressional concern was misuse and mismanagement of plan assets by plan administrators." *Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 140 n.8 (1985) (citations omitted). To effectuate this concern, Congress imposed a number of detailed duties on plan fiduciaries. *DiFelice v. U.S. Airways, Inc.*, 497 F.3d 410, 417 (4th Cir. 2007). ERISA § 404, 29 U.S.C. § 1104, codifies the duties of loyalty and care owed by a plan fiduciary:

> (a)(1) [A] fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and –
>
> (A) for the exclusive purpose of:
>
> (I) providing benefits to participants and their beneficiaries; and

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the cause thereof. Specifically, the Plan's assets were reduced through the payment of excessive fees for mutual fund investments. This loss was caused by Defendants imprudent decision to invest in more expensive, but otherwise identical, retail share classes when cheaper institutional share classes were available. Had Defendants exercised their duty of prudence, the Plan would not have paid excessive fees. *See In re First American Corp. ERISA Litig.*, 258 F.R.D. at 617. These losses are redressable under ERISA § 409, 29 U.S.C. § 1109.

> (ii) defraying reasonable expenses of administering the plan;
>
> (B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;

29 U.S.C. § 1104(a)(1)(A) and (B). Subsection (a)(1)(A) codifies the duty of loyalty, while subsection (a)(1)(B) articulates the duty of prudence. These duties are "the highest known to the law." *SEC v. Capital Consultants, LLC,* 397 F.3d 733, 751 (9th Cir. 2005).

1. Duty of Loyalty

The duty of loyalty requires a fiduciary to "discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries." 29 U.S.C. § 1104(a)(1)(A). A fiduciary must "act with complete and undivided loyalty to the beneficiaries of the trust," and must make any decisions in a fiduciary capacity "with an eye single to the interests of the participants and beneficiaries." *Leigh v. Engle,* 727 F.2d 113, 123 (7th Cir. 1984) (quotations omitted); *see Donovan v. Bierwirth,* 680 F.2d 263, 272 n.8 (2d Cir. 1982); *DiFelice,* 497 F.3d at 418-19. These responsibilities have their source in the common law of trusts. *Pegram v. Herdrich,* 530 U.S. 211, 224 (2000). As Judge Cardozo famously stated: "Many forms of

conduct permissible in a workaday world for those acting at arm's length are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the marketplace. Not honestly alone, but the punctilio of an honor the most sensitive, is then the standard of behavior." *Meinhard v. Salmon,* 249 N.Y. 458, 464 (Ct. App. 1928).

Although ERISA's duty of loyalty gains definition from the law of trusts, there is an important distinction provided for by the statute's provisions. *See Variety Corp. v. Howe,* 516 U.S. 489, 497 (1996) ("We also recognize that trust law does not tell the entire story."); *DiFelice,* 497 F.3d at 417 ("The common law of trusts, therefore, 'will inform, but will not necessarily determine the outcome of, an effort to interpret ERISA's fiduciary duties.'") (quoting *Variety Corp.,* 516 U.S. at 497). Under ERISA, "a fiduciary may have financial interests adverse to beneficiaries, but under trust law a trustee is not permitted to place himself in a position where it would be for his own benefit to violate his duty to the beneficiaries." *Bussian v. RJR Nabisco, Inc.,* 223 F.3d 286, 295 (5th Cir. 2000). Thus, unlike in trust law, ERISA contemplates that in many circumstances a plan fiduciary will "wear two hats," and may have conflicting loyalties. *Id.*; *see Cunha v. Ward Foods, Inc.,* 804 F.2d 1418, 1432 (9th Cir. 1986) (citing *Amato v. Western Union Int'l, Inc.,* 596 F. Supp. 963, 968 (S.D.N.Y. 1984); *Friend v. Sanwa Bank of California,* 35 F.3d 466, 469 (9th Cir. 1994). Under ERISA, a conflict of interest alone is not a per se breach: "nowhere in the

statute does ERISA explicitly prohibit a trustee from holding positions of dual loyalties." *Friend,* 35 F.3d at 468-69. Instead, to prove a violation of the duty of loyalty, the plaintiff must show "actual disloyal conduct." *In re McKesson HBOC, Inc. ERISA Litig.,* 391 F. Supp. 2d 812, 834-35 (N.D. Cal. 2005) (ERISA fiduciaries do not breach their duty of loyalty simply by "placing themselves in a position" where they might act disloyally.).

Consistent with this rule, a fiduciary does not breach his duty of loyalty by pursuing a course of conduct which serves the interests of the plan's beneficiaries while at the same time "incidentally benefitting" the plan sponsor or even the fiduciary himself. *See Morse v. Stanley,* 732 F.2d 1139, 1146 (2d Cir. 1984); *Donovan v. Bierwirth,* 680 F.2d 263, 271 (2d Cir. 1982); *Siskind v. Sperry Ret. Program, Unisys,* 47 F.3d 498, 506 (2d Cir. 1995). The benefit, however, must be *incidental* to a decision that is in the best interests of the plan participants. As the Second Circuit explained: "Although officers of a corporation who are trustees of its pension plan do not violate their duties as trustees by taking action which, after careful and impartial investigation, they reasonably conclude best to promote the interests of participants simply because it incidentally benefits the corporation their decisions must be made with an eye single to the interests of the participants and beneficiaries." *Bierwirth,* 680 F.2d at 271; *see Bussian,* 223 F.3d at 295 ("Despite the ability of an ERISA fiduciary to wear two hats, 'ERISA does

require that the fiduciary with two hats wear only one at a time, and wear the fiduciary hat when making fiduciary decisions.'") (quoting *Pegram,* 530 U.S. 211). In sum, an investment decision that happens to benefit the plan sponsor or the fiduciary himself does not constitute a breach of the duty of loyalty, so long as that decision was made solely in the best interests of the plan participants and the beneficiaries. *See, e.g., Morse v. Stanley,* 732 F.2d at 1146 (fiduciary's decision to deny accelerated payments to departing employees maintained the fiscal integrity of the Plan while also benefitting the company); *Siskind,* 47 F.3d at 506 ("Where the employer is viewed as a participant in the single employer plan, it shares with its employees an interest in having the pension plan contribute to business profitability along with its principal task of ensuring future benefits to employees ").

2. Duty of Prudence

ERISA requires that a fiduciary act with the "care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims." 29 U.S.C. § 1104(a)(1)(B) (2006). Like the duty of loyalty, the duty of prudence is "the highest known to the law." *Howard v. Shay,* 100 F.3d 1484, 1488 (9th Cir. 1996) (quoting *Donovan v. Bierwirth,* 680 F.2d 263, 272 n.8 (2d Cir. 1982).

"Prudence is measured according to the objective 'prudent person' standard developed in the common law of trusts." *Whitfield v. Cohen,* 682 F.Supp. 188, 194 (S.D.N.Y. 1988) (citing *Donovan v. Mazzola,* 716 F.2d 1226, 1231 (9th Cir. 1983) and S. Rep. N. 93-127, 93d Cong., 2nd Sess., reprinted in 1974 U.S. Code Cong. & Ad. News 4639, 4838, 4865). Under the common law of trusts, a trustee is "duty-bound to make such investments and only such investments as a prudent [person] would make of his own property having in view the preservation of the estate and the amount and regularity of the income to be derived. " *In re Unisys Savings Plan Litig.,* 74 F.3d 420, 434 (3d Cir. 1996) (quoting Restatement (Second) of Trusts § 227 (1959)).

The prudence standard is not that of a prudent lay person, but rather that of a prudent fiduciary with experience dealing with a similar enterprise. *Whitfield,* 682 F. Supp. at 194 (citing *Mazzola,* 716 F.2d at 1231-21). To determine whether the fiduciary has met the prudence standard, "the court focuses not only on the merits of the transaction, but also on the thoroughness of the investigation into the merits of the transaction." *Howard,* 100 F.3d at 1488. The question is whether, "at the time they engaged in the challenged transactions, [the fiduciaries] employed the appropriate methods to investigate the merits of the investment and to structure the investment." *Mazzola,* 716 F.2d at 1232; *Fink v. National Savings and Trust Co.,* 772 F.2d 951, 957 (D.C. Cir. 1985) ("A fiduciary's independent investigation of the merits of

a particular investment is at the heart of the prudent person standard."). The prudence test focuses on the conduct of the fiduciaries when making the investment decision and not on the resulting performance of the investment. *Donovan v. Cunningham,* 716 F.2d 1455, 1467 (5th Cir. 1983). ("The focus of the inquiry is how the fiduciary acted in his selection of the investment, and not whether his investments succeeded or failed.") (quoting 19B *Business Organizations,* S. Young, *Pension and Profit-Sharing Plans* § 17.02[3] at 17-29).

A fiduciary may secure independent advice from counsel or a financial advisor when making investment decisions, and indeed must do so where he lacks the requisite education, experience, and skill. *Donovan v. Bierwith* [sic], 680 F.2d 263, 272-73 (2d. Cir. 1982) (Friendly, J.). However, while securing independent advice is evidence of a thorough investigation, it does not act as a complete defense to a charge of imprudence. *Howard,* 100 F.3d at 1489; *Bierwirth,* 680 F.2d at 272 (independent advice of counsel does not operate as a "complete whitewash which, without more, satisfies ERISA's prudence requirement.") The fiduciary must investigate the expert's qualifications, provide accurate information to the expert, and ensure that reliance on the expert's advice is reasonably justified under the circumstances. *Howard,* 100 F.3d at 1489; *Mazzola,* 716 F.2d at 1234. Ultimately, the fiduciary has a duty to exercise his own judgment in light of the information and advice he receives. *Crowhurst v. Cal. Institute of Tech.,* No. CV 9605433

RAP (Shx), 1999 WL 1027033, at *19 (C.D. Cal., July 1, 1999) (citing *Mazzola,* 716 F.2d at 1231).

The failure to investigate and evaluate a particular investment decision is a breach of fiduciary duty that may warrant an injunction against or the removal of the trustee (and perhaps the recovery of trustees fees paid for investigative services that went unperformed). *Fink,* 772 F.2d at 962. However, the failure to investigate alone cannot sustain an action for damages where the investment decision nonetheless was objectively prudent. *Id.* ("I know of no case in which a trustee who has happened – through prayer, astrology or just blind luck – to make (or hold) objectively prudent investments has been liable for losses from those investments because of his failure to investigate and evaluate beforehand.") (Scalia, J., concurring); *Roth v. Sawyer-Cleator Lumber Co.,* 16 F.3d 915, 919 (8th Cir. 1994); *Whitfield,* 682 F. Supp. at 195. Thus, having found that the fiduciary failed to investigate a particular investment adequately, the court must then examine whether, in light of the facts that an adequate and thorough investigation would have revealed, the investment was objectively imprudent. *Whitfield,* 682 F. Supp. at 195; *see, e.g., Mazzola,* 716 F.2d at 1232 (finding a breach of duty where a reasonable investigation would have revealed that the loan the Plan made to a convalescent home was far below prevailing interest rates and "presented an unreasonable risk of not being timely and fully paid."); *Katsaros v. Cody,* 744 F.2d 270, 279-80 (2d Cir. 1984) (had the trustees engaged in an

adequate investigation they would have discovered that "the loan was a loser from its inception"); *In re Unisys. Savings Plan Litig.*, 74 F.3d at 436 (denying summary judgment to fiduciaries where plaintiffs presented evidence that a thorough investigation (which was not done) would have revealed serious problems with the investment). The prudence of the challenged decision is judged at the time it was made, rather than with the benefit of hindsight. *Roth,* 16 F.3d at 917-18; *DiFelice,* 497 F.3d at 424.

In sum, if the investment decision is one that a prudent person would make at the time it was made, there is no liability for loss to the Plan participants. *In re Unisys. Savings Plan Litig.*, 74 F.3d at 434; *Roth,* 16 F.3d at 919 ("Even if a trustee failed to conduct an investigation before making a decision, he is insulated from liability if a hypothetical prudent fiduciary would have made the same decision anyway."); *see In re McKesson HBOC, Inc. ERISA Litig.*, 391 F. Supp. 2d 812, 835 (N.D. Cal. 2005) ("Because it was not imprudent to refuse to sell company stock, [defendant's] alleged conflict could not have harmed plaintiff.")

D. Challenged Conduct by the Plan Fiduciaries

1. Mutual Fund Investments

Plaintiffs contend that Defendants violated both their duty of loyalty and their duty of prudence when they invested in the retail share classes rather than

the institutional share classes of the following six mutual funds: (1) Janus Small Cap Value Fund ("Janus Fund"); (2) Allianz CCM Capital Appreciation Fund ("Allianz Fund"); (3) Franklin Small-Mid Cap Growth Fund ("Franklin Fund"); (4) William Blair Small Cap Growth Fund ("William Blair Fund"); (5) PIMCO RCM Global Tech Fund ("PIMCO Fund"); and (6) MFS Total Return Fund.

a. Duty of Loyalty

As to the duty of loyalty, Plaintiffs contend that, when deciding to invest in the retail share classes rather than the cheaper institutional share classes of these funds, Defendants were improperly motivated by a desire to capture more revenue sharing for SCE even though doing so increased the fees charged to Plan participants. Plaintiffs contend that Defendants put the interests of SCE in offsetting the record-keeping costs to Hewitt Associates above the interests of the Plan participants in paying lower fees.

Plaintiffs rely primarily on a series of emails, generally between members of the Investments Staff and members of the SCE Human Resources Department, to support their claim that the Plan fiduciaries were improperly motivated by a desire to capture revenue sharing. Specifically, Plaintiffs point to the following evidence:

- On March 11, 2003, David Ertel, head of the Investments Staff, emailed George Grana, an

employee of SCE's Human Resources Department and copied on the email other members of the Human Resources Department and Marvin Tong, a member of the Investments Staff. In the email, Ertel told Grana that the Investments Staff and HFS were researching 5 new funds for the Plan. Ertel asked Grana, "We are having them [Hewitt Financial Services] look at fund share classes with lower expense ratios (even if there is no revenue sharing). Question: if we delete funds that have high revenue sharing with one that has none, is that still acceptable on an incremental basis?"

- On March 17, 2003, Barbara Decker and George Grana, both of the Human Resources Department, discussed via email the availability of revenue sharing from mutual funds. In the email communication Grana told Decker that Ertel was asking for clarification "about fund selection and 12b1 fee offsets." Grana proposes to tell Ertel that when a fund manager offers the same fund with different share classes but one has more favorable revenue sharing, if all else is equal, "we should continue to use a share class which offers a reasonable revenue sharing arrangement."[15]

- On June 24, 2003, Josh Cohen of HFS wrote an email to Marvin Tong which, among other things, provided the revenue sharing available in the share classes of several mutual funds that the

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[15] There is no evidence that this message was delivered or communicated to Ertel or anyone on the Investments Staff or Investment Committees.

Investments Staff was considering adding to the Plan. Cohen noted that one of the funds, the Templeton Developing Markets Fund, had "revenue sharing issues." Cohen wrote, "While I don't think this would have a bearing on your decision to add a Franklin fund, you may want to let Diane know your intentions to do so." (Diane refers to Diane Kobashigawa, who at the time was the Manager of Benefits Administration in the SCE Human Resources Department.)

- On June 25, 2003, Lorie Padilla of the Human Resources Department emailed other members of the Human Resources Department as well as David Ertel and Marvin Tong and attached an estimate of "how the 12b-1 income [revenue-sharing] may change with the suggested fund changes."

- Also on June 25, 2003, David Ertel responded to the email sent by Lorrie Padilla. Ertel modified the worksheet to reflect a proposed change to the PIMCO RCM Global Technology Fund. Ertel noted that the Investments Staff was considering recommending that the Investment Committees convert the retail share of the PIMCO Fund to institutional shares, and that if they adopted that recommendation, "we would pick up a Morningstar rating, and historical information, and would lose $105,000 in 12b-1 fees [revenue sharing]." Ertel asked the email recipients, "What does everyone think of the tradeoff?"

While these emails certainly indicate that members of the Investments Staff were ***aware*** of the benefits of revenue-sharing, there is no evidence that

members of the Investments Staff were motivated by revenue sharing when making fund recommendations to the Investment Committees. David Ertel testified that the reason he discussed revenue sharing with members of the SCE Human Resources Department in 2003 is because the Human Resources Department is responsible for overseeing the administration of the Plan and the budget/expenses related thereto. Ertel wanted to notify the Human Resources Department of what offsets would potentially be available to SCE to satisfy their obligations to the record-keeper, Hewitt Associates. Ertel testified that these communications were strictly for the purpose of having the Human Resources Department deal with budgetary matters and did not influence the selection of any mutual funds for the Plan. Having observed the witness during trial, the Court finds this testimony credible.

Furthermore, Ertel's testimony is supported by the contents of the emails themselves. For example, in the June 24, 2003 email, when Josh Cohen indicated to Ertel that a mutual fund had revenue sharing issues, Cohen stated, "I don't think this would have a bearing on your decision to add a Franklin fund," but suggested that Ertel let the Human Resources department know about the change. Similarly, in the June 25, 2003 emails, Lorrie Padilla of the Human Resources Department attempts to estimate the effect of certain fund changes on the administrative budget through 12b-1 fees, and communicates with Ertel and the Investments Staff for that purpose. However,

there is no evidence that Lorrie Padilla or any other employee from Human Resources employee [sic] ever told Ertel or anyone on the Investments Staff to consider funds that would increase revenue sharing.

It is also undisputed that the SCE Human Resources Department has no authority over which funds are recommended or selected for the Plan's line-up. Plaintiffs did not present any evidence that the Human Resources staff ever discussed revenue sharing with the Investment Committee members who had the authority to select the funds for the Plan.

David Ertel and Marvin Tong both testified that the Investments Staff never considered revenue sharing when making recommendations to the Investment Committees to add or replace mutual funds.[16] Ertel also testified that revenue sharing was

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[16] Plaintiffs attempted to rebut this testimony by introducing Trial Exhibit 78, an email purportedly from David Ertel to Josh Cohen at HFS. The email is dated 06/24/2003 and states: "Criteria for selecting mutual funds per discussion with DFW and Dave Ertel . . Between Classes: 2. Morningstar rating is available, 3. Works in 3 main tracking sites . . 4. Revenue sharing is favorable." Plaintiffs argue that this email demonstrates that Ertel believed favorable-revenue sharing was a relevant criteria when recommending mutual fund share classes.

In response, however, Ertel testified that he did not write this email. Barbara Decker ("Decker") testified under oath that she wrote the email reflected at the top of Trial Exhibit 78 as a note to herself, and it was not sent to anyone. Decker is the director of benefits in SCE's Human Resources Department. She has no authority to recommend or select mutual fund

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never discussed at any of the meetings with the Investment Committees. Further, Ertel testified that no one ever instructed him to consider revenue sharing in his analysis of whether or not to recommend a certain fund. Having observed Ertel and Tong, the Court finds this testimony credible. Thus, the Court concludes that these emails do not demonstrate that the Plan fiduciaries were motivated by revenue sharing when selecting mutual funds for the Plan.

More importantly, the actual fund selections made by the Investment Committees in mid-2003 belie any argument that the Plan fiduciaries were motivated by a desire to capture revenue sharing. Each of the purportedly damaging emails discussed above relate to the fund recommendations that the Investments Staff was considering for the June and July 2003 meetings of the Investment Committees. At those 2003 meetings, the Investments Staff recommended adding six new mutual funds to the Plan, and the Investments Committees adopted those recommendations. With regard to each of the six funds added to the Plan in 2003, the Investment

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investments for the Plan line-up. Decker also testified under oath that she had never advised nor suggested to any members of the Investments Staff or the Investments Committee that a mutual fund should be selected or retained because of the availability of revenue sharing. The Court finds the testimony credible and therefore concludes that Trial Exhibit 78 does not reflect that Ertel believed revenue sharing should be considered when recommending a mutual fund share class to the Investment Committees.

Committees chose to invest in the fund share class with the **lowest expense ratio and the lowest revenue sharing,** with the exception of one fund, the Vanguard Mid-Cap Index Fund, which had no revenue sharing in either share class. Thus, the decisions made by the fiduciaries at the 2003 meetings clearly were not motivated by a desire to increase revenue sharing.

The mutual fund selections from 2002 to 2008 evidence a pattern that is flatly inconsistent with a desire to capture more favorable revenue sharing arrangements. From 2002 to 2008, the Plan fiduciaries made 39 additions or replacements to the mutual fund in the Plan's investment line-up. In 18 out of 39 instances, Defendants chose to replace an existing mutual fund with one offering less revenue sharing or no revenue sharing at all; and in 11 instances, the changes resulted in no net change in the amount of revenue sharing received by SCE. In only 6 instances out of 39 did the Plan fiduciaries select a replacement fund that offered a higher amount of revenue sharing.[17] This pattern is strong evidence that the Plan fiduciaries were not motivated by a revenue-sharing when making mutual fund selections. *See Bussian v.*

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[17] The six mutual fund replacements that resulted in a net increase in revenue sharing occurred sporadically throughout the years – one replacement was made in 2002, one in 2003, two in 2004, one in 2007, and one in 2008. The sporadic nature of these decisions is not consistent with a conscious effort to increase revenue sharing at any given time.

RJR Nabisco, Inc., 223 F.2d 286, 289 (5th Cir. 2000) (When analyzing a duty of loyalty claim, "the proper inquiry has as its central concern the extent to which the fiduciary's conduct reflects a subordination of beneficiaries' and participants' interests to those of a third party."); *compare Leigh v. Engle*, 727 F.2d 113, 126 (7th Cir. 1984) (breach of duty of loyalty found where "the trust's use of its assets at **all relevant times** tracked the best interests of [third parties]; "the extent and duration of actions congruent with the interests of another party" were relevant in deciding whether defendants breached their duty of loyalty.) (emphasis added).

Finally, there is no evidence that any of the Plan fiduciaries considered revenue-sharing when selecting or deciding to retain *the six mutual funds at issue* in this case. As stated above, the emails and documents that Plaintiffs rely on to support their breach of loyalty claim relate to the fund selections that the Plan fiduciaries made in 2003. However, all six of the funds at issue in this case were added to the Plan prior to 2003, long before these emails were written. Of the six funds relevant to this case, only one was even involved in the 2003 changes – the PIMCO RCM Global Technology Fund. With regard to the PIMCO Fund, however, the change that Defendants actually made in 2003 was to transfer all the assets from the retail share class into an institutional share class which had a lower expense ratio and offered less

revenue sharing.[18] This change, like the other fund selections made in 2003, could not have been motivated by a desire to capture revenue sharing. Plaintiffs did not introduce any evidence that the Plan fiduciaries discussed revenue sharing in connection with the selection of the Janus Fund or the Franklin Fund in March 1999, or in connection with the selection of the MFS Total Return Fund, the William Blair Fund or the PIMCO Fund in July 2002.

In sum, the Court concludes that there is no evidence that the Plan fiduciaries engaged in actual disloyal conduct. The Plan fiduciaries did not make fund selections with an eye toward increasing revenue sharing and did not put the interests of SCE above those of the Plan participants. For these reasons, Plaintiffs' duty of loyalty claim fails.[19]

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[18] With regard to the PIMCO Fund, Plaintiffs do not claim any damages after October 2003, when the assets in the fund were transferred from the retail share class to the institutional share class.

[19] During the trial and at post-trial hearings, the Court and the parties engaged in extensive discussion regarding whether a breach of the duty of loyalty requires that the fiduciary act *with intent* to advantage himself or third-parties over the plan beneficiaries, or whether the simple fact that the fiduciary made certain investment decisions that were not in the beneficiaries' best interests suffices to show a breach of the duty of loyalty. Ultimately, the Court does not need to reach this issue, as Plaintiffs have alleged both duty of loyalty and duty of prudence claims based on the same investment decisions, and the latter does not require intent.

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b. Duty of Prudence

Plaintiffs' duty of prudence argument is simple: Plaintiffs contend that, even if the Plan fiduciaries were not improperly motivated by revenue-sharing benefits, it was objectively imprudent for the Plan fiduciaries to decide to invest (or to continue to invest) in retail share classes of the six mutual funds where identical investments were available in the institutional share classes for lower fees. In other words, a prudent person managing his own funds

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Nonetheless, in reviewing the relevant authorities, the Court concludes that the duty of loyalty is primarily concerned with conflicts of interest; thus, a breach of that duty requires some showing that the fiduciaries' decisions were *motivated by* a desire to serve the interests of over [sic] those of the beneficiaries. *See Pilkington PLC v. Perelman*, 72 F.3d 1396, 1401-02 (9th Cir. 1995) (triable issue existed as to defendant's breach of the duty of loyalty where there was strong evidence that the trustees were attempting to maximize the amount of funds reverted to the company at the beneficiaries' expense); *Cooke v. Lynn Sand & Stone Co.*, 673 F. Supp. 14, 24 (D. Mass. 1986) (same); *Leigh v. Engle*, 858 F.2d 361, 364 (7th Cir. 1988) ("[T]he administrators breached their duties [of loyalty] when they made investment decisions out of personal motivations, without making adequate provisions that the trust's best interests would be served."); *Wright v. Nimmons*, 641 F. Supp. 1391, 1402 (S.D. Tex. 1986) (the duty of loyalty requires that "the fiduciary must not abuse his position of trust in order to advance his own selfish interests"); George Gleason Bogert et al., Bogert's Trusts and Trustees § 255 (2d ed. 2009) (the duty of loyalty requires that the fiduciary act "solely in the interest of the plan's participants without balancing those interests with the interests of the company.")

would invest in the cheaper share class, all else being equal, because doing so saves money.

With regard to the six specific mutual funds at issue here, Plaintiffs make different arguments about the prudence of Defendants' investment decisions depending upon when the mutual funds were added to the Plan. Three of the mutual funds – the William Blair Fund, the PIMCO Fund, and the MFS Total Return Fund – were added to the Plan after August 2001, within the statute of limitations period. Plaintiffs therefore argue that the **initial decision to invest** in the retail share classes rather than the institutional share classes of these funds constituted a breach of the duty of prudence. Plaintiffs seek damages representing the difference in fees in the retail versus institutional share classes and lost investment opportunity from the time in which the William Blair, PIMCO, and MFS Total Return funds were first added to the Plan to the present.

The remaining three funds – Janus, Allianz, and Franklin – were added to the Plan before August 16, 2001, which is outside the statute of limitations period for this action. Plaintiffs therefore do not challenge Defendants' initial decisions to invest in the retail share classes when the funds were first added to the Plan. Rather, Plaintiffs argue that the Janus Fund, the Allianz Fund, and the Franklin Fund all underwent significant changes during the statute of limitations period that should have triggered Defendants to conduct a full due diligence review of the funds, equivalent to the diligence review Defendants

conduct when adding new funds to the Plan. Plaintiffs contend that had this due diligence been done, Defendants would have realized that the Plan was paying excessive fees by investing in the retail rather than the institutional share classes, and would have changed share classes. Plaintiffs contend that Defendants' failure to conduct a due diligence review of the fees charged for the funds at the time of these significant events and the decision to retain the retail share class after these events constituted a breach of the duty of prudence. Plaintiffs seek damages representing the difference in fees in the retail versus institutional share classes for the Janus, Allianz, and Franklin funds and lost investment opportunity from the time in which the funds underwent these significant changes to the present.

The Court addresses each of these arguments in turn.

i. Funds Added to the Plan After August 17, 2001

The William Blair Small Cap Growth Fund ("William Blair Fund"), the PIMCO RCM Global Technology Fund ("PIMCO Fund") and the MFS Total Return A Fund ("MFS Total Return Fund") were all added to the Plan in July 2002. At that time, both retail share classes and institutional share classes were available for all three funds. The only difference between the retail share classes and the institutional share classes was that the retail share classes

charged higher fees to the Plan participants. Otherwise, the investments were identical. Defendants chose to invest in the retail share classes of all three of these funds.

To determine whether the decision to invest in retail share classes constitutes a breach of the duty of prudence, the Court must examine whether the fiduciaries engaged in a thorough investigation of the merits of the investment at the time the funds were added to the Plan. *See Howard v. Shay,* 100 F.3d 1484, 1488 (9th Cir. 1996); *Donovan v. Mazzola,* 716 F.2d 1226, 1232 (9th Cir. 1933). Defendants assert that one of the five Investment Criteria they use to evaluate a mutual fund is the expense ratio of the fund – i.e., the fees charged to Plan participants. Further, both Plaintiffs' expert, Dr. Steven Pomerantz, and Defendants' expert, Daniel Esch, testified that a prudent fiduciary commonly would review all available share classes and the relative costs for each when selecting a mutual fund for a 401(k) Plan. Here, however, there is ***no evidence*** that Defendants even considered or evaluated the different share classes for the William Blair Fund, the PIMCO Fund, or the MFS Total Return Fund when the funds were added to the Plan. Not a single witness testified regarding any discussion or evaluation of the institutional versus retail share classes for these funds prior to July 2002. Indeed, Ertel admitted that when the Investments Staff made their presentation to the Sub-TIC (the committee with the ultimate authority for selecting funds for the Plan)

regarding the merits of adding the MFS Total Return Fund to the Plan in 2002, they did not present the Sub-TIC with any information about the institutional share class. The same appears to be true regarding the William Blair Fund and the PIMCO Fund. The presentation materials that the Investment Staff prepared for the January 28, 2002 meeting of the Sub-TIC – the meeting during which the Investments Staff recommended adding these three funds to the Plan – contains ***no information*** about the institutional share classes of the William Blair, PIMCO or MFS Total Return funds. The Investments Staff simply recommended adding the retail share classes of these three funds without any consideration of whether the institutional share classes offered greater benefits to the Plan participants. Thus, the Plan fiduciaries responsible for selecting the mutual funds (the Investment Committees) were not informed about the institutional share classes and did not conduct a thorough investigation.

Moreover, had the Investments Staff and the Investment Committees considered the institutional share classes when adding these funds in 2002 and weighed the relative merits of the institutional share classes against the retail share classes, they would have realized that the institutional share classes offered the exact same investment at a lower cost to the Plan participants. Thus, Defendants would have known that investment in the retail share classes would cost the Plan participants wholly unnecessary fees. *See, e.g., Mazzola,* 716 F.2d at 1232 (finding a

breach of duty where a reasonable investigation would have revealed that the loan the Plan made to a convalescent home was far below prevailing interest rates and "presented an unreasonable risk of not being timely and fully paid."); *Katsaros v. Cody*, 744 F.2d 270, 279-80 (2d Cir. 1984) (had the trustees engaged in an adequate investigation they would have discovered that "the loan was a loser from its inception"); *In re Unisys. Savings Plan Litig.*, 74 F.3d at 436 (denying summary judgment to fiduciaries where plaintiffs presented evidence that a thorough investigation (which was not done) would have revealed serious problems with the investment).

In fact, in 2003, a year after these funds were added to the Plan, the Investments Staff did review the merits of the institutional share class of the PIMCO Fund versus the retail share class. At that time, the Investments Staff reviewed the available share classes for the PIMCO Fund because they were considering mapping a large amount of assets from another fund into the PIMCO Fund. In the course of that review, Ertel realized that the institutional share class of the PIMCO Fund had a significant performance history and a Morningstar rating, whereas the retail share class did not. Ertel also realized that the institutional share class charged less 12b-1 fees to the Plan participants. Thus, the Investments Staff recommended, and the Investment Committees adopted the recommendation, that the retail shares of the PIMCO Fund should be transferred into the institutional share class. These facts

are very telling: In the one instance in which the Plan fiduciaries actually reviewed the different share classes of one of these three funds, the fiduciaries realized that it would be prudent to invest in the institutional share class rather than the retail share class. Had they done this diligence earlier, the same conclusion would have been apparent with regard to all three funds, and the Plan participants would have saved thousands of dollars in fees.

On the basis of the evidence outlined above, Plaintiffs have met their burden of demonstrating that the Plan fiduciaries did not act with the care, skill, and diligence of a prudent man acting in a like capacity when deciding to invest in the retail share classes of the William Blair, PIMCO, and MFS Total Return funds.

Defendants nonetheless contend that their investment selection process in 2002 was reasonable and thorough because they relied on Hewitt Financial Services ("HFS") for advice regarding which mutual fund share classes should be selected for the Plan. Defendants' expert, Esch, opines that in 2002 plan fiduciaries did not have access to information about different share classes, and therefore, reliance on HFS's advice was reasonable.[20]

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[20] Ertel and Tong testified that when selecting mutual funds to recommend for the Plan from 2003 forward, the Investments Staff always selected the most inexpensive share class that met the Plan's Investment Criteria. The process for selecting mutual

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While securing independent advice from HFS is some evidence of a thorough investigation, it is not a complete defense to a charge of imprudence. *See Howard,* 100 F.3d at 1489. At the very least, the Plan fiduciaries must "make certain that reliance on the expert's advice is reasonably justified." *Id.*; *Donovan v. Bierwith* [sic], 680 F.2d 263, 272-73 (2d. Cir. 1982) (Friendly, J.) (independent advice from counsel does not act as a "complete whitewash which, without more, satisfies ERISA's prudence requirement."). Here, the Court cannot conclude that reliance on HFS's advice (whatever that advice may have been, which is unclear) was reasonable. Defendants have not presented any evidence regarding the review and evaluation HFS did in connection with the William Blair, PIMCO, and MFS Total Return funds. Defendants did not present evidence of: the specific recommendations HFS made to the Investments Staff regarding those funds, what the scope of HFS's review was, whether HFS considered both the retail and the institutional share classes, whether HFS provided information to the Investments Staff about the different share classes, what questions were

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funds after 2003, however, is not relevant to the investment selections made in July 2002. Further, it is clear that the Investments Staff did not follow that framework with regard to the William Blair, PIMCO, and MFS Total Return funds. With regard to those funds, both the retail share class and the institutional share class were equal in all respects other [sic] the fees charged to participants; thus, both share classes would have met the Investment Criteria.

asked regarding the recommendations, and what steps the Investments Staff took to evaluate HFS's recommendations. Thus, while reliance on HFS's recommendations may be justified in some circumstances, in the absence of any evidence about the thoroughness and scope of HFS's review as to these three particular funds, the Court cannot conclude that such reliance was prudent. *See Howard,* 100 F.3d at 1489 (finding a breach of the duty of prudence where fiduciaries relied solely on a valuation provided by Arthur Young when selling stock and did not ask any questions about the valuation despite the fact that Arthur Young provided no empirical support for several of the assumptions.).

At trial, Defendants could not offer any credible reason why the Plan fiduciaries chose the retail share classes of the William Blair, PIMCO and MFS Total Return funds. Defendants' witnesses offered three *possible* reasons why the Investments Staff might recommend investment in a retail share class rather than a cheaper institutional share class: *First,* Ertel testified that one of the Investment Criteria for selecting a fund is the availability of public information about the fund, including a Morningstar rating and performance history. Thus, *if* the retail share class of a certain mutual fund had significant performance history and a Morningstar rating, but the institutional share class did not, the Investments Staff would recommend investment in the retail share class. *Second,* Tong testified that frequent changes to the Plan cause confusion among the Plan

participants.[21] Thus, to avoid frequent changes to the Plan, if the Plan had previously chosen to invest in the retail share class, the Investments Staff would not recommend changing to the institutional share class so long as the investment was meeting the Investment Criteria. *Third*, Ertel testified that certain minimum investment requirements might preclude the Plan from investing in the institutional share classes.

None of these explanations is supported by the facts in this case. As to the first explanation, Defendants presented no evidence that the retail share classes of the William Blair, PIMCO, and MFS Total Return funds had more significant track records or provided any greater information to the Plan participants than the institutional share classes. In fact, Ertel testified that *none* of the mutual funds at issue in this case presented a situation where the retail share class had a performance history and a Morningstar rating but the institutional share class did not. The exact opposite is true regarding two of the funds. When Defendants chose to invest in the retail share class of the William Blair Fund, the retail class did *not* have a Morningstar rating. Similarly, when Defendants added the PIMCO Fund to the Plan in July 2002, the retail share class did *not* have

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[21] Barbara Decker, the Director of Benefits in SCE's Human Resources Department testified that she had received complaints from the employees' unions regarding changes to the Plan's investment options.

a Morningstar rating or significant performance history, while the institutional share class did have those features. If Defendants had investigated the different share classes for the William Blair Fund and the PIMCO Fund in July 2002, by Defendants' own Investment Criteria they would have realized that the institutional share classes were superior to the retail share classes – that is, the institutional classes were both less expensive (lower expense ratio) and provided more publicly available information.

Similarly, the argument that the Investments Staff refrained from making changes to certain investments because of possible participant confusion is not supported by the facts. Defendants did not produce any documents or other evidence indicating that the reason the Plan fiduciaries chose the retail share classes of the William Blair Fund, the PIMCO Fund, and the MFS Total Return Fund was to mitigate participant confusion. Indeed, such an argument is illogical with respect to these funds because all three of the funds were added to the Plan as new investment options. In other words, the Plan fiduciaries had already decided to add an additional investment option to the Plan; adding an institutional retail share class would not cause any greater confusion than adding a retail share class. Furthermore, although Defendants did produce evidence that Unions representing Edison employees had complained about past fund changes, these complaints resulted from changes to the funds as a whole – i.e., eliminating and/or adding a fund to the Plan – not as a result of

changes from one share class to another. No evidence was produced that Plan participants had complained in the past about changes from one share class to another.

Finally, Defendants' argument that mandatory investment minimums precluded Defendants from investing in the institutional share classes of the William Blair Fund, the PIMCO Fund, and the MFS Total Return Fund is not credible. While it is true that in July 2002 the institutional share classes of each of these three funds required a minimum investment that the Plan did not meet, the unrebutted evidence establishes that a prudent fiduciary managing a 401(k) plan the size of the Edison Plan could have (and would have) obtained a waiver of the investment minimums.

As the findings of fact indicate, the minimum investment requirements for the William Blair, PIMCO and MFS Total Return funds were not set in stone. The Prospectuses filed with the SEC in late 2001 and early 2002 for each of these three funds all indicate that the funds will consider a waiver of the investment minimums for certain investors.

Plaintiffs' expert, Dr. Steven Pomerantz ("Pomerantz") opined that the William Blair Fund, the PIMCO Fund, and the MFS Total Return Fund would have waived the investment minimums for the Plan had anyone from Edison asked them to do so. Pomerantz offered several examples from his personal experience to support this conclusion: From 1994 to

2000, Pomerantz worked for a registered investment advisor offering several mutual funds. The advisor made a business decision to eliminate all investment minimums on the funds. Additionally, Pomerantz consults to an investment advisor that has a stated minimum investment of $1 million for its funds. Pomerantz testified that the advisor has been approached dozens of times over the past 12 years and asked to waive the minimum. In every instance, the advisor did so. Pomerantz also consults with an insurance company and helps the company manage its one-billion-dollar general reserve fund. The company purchases all of its mutual funds through a broker called Northwestern Mutual and currently is invested in approximately 30 mutual funds. With regard to each of those funds, the insurance company is permitted to invest in the cheapest institutional share class *regardless of the stated minimums.* In other words, even where the company's investment would not meet the minimum, Northwestern Mutual obtains a waiver from the mutual fund.

Based on this (and other) experience, Pomerantz opines that a 401(k) Plan like Edison's, with assets over $1 billion dollars, presents a large opportunity for investment advisors. That is, a relationship with the Edison Plan could lead to millions in assets under management for the advisor. In light of that opportunity, investment advisors generally are willing to waive investment minimums for investors like the Edison Plan and would have done so in this case.

The testimony of Defendants' expert, Daniel Esch, is largely consistent with Pomerantz's opinions. Since 1994, Esch has served as the Chief Executive Officer and Managing Director of Defined Contribution Advisors, Inc., a firm that is a registered investment advisor and provides investment advisory services to corporations and plan fiduciaries regarding (among other things) investment selection and monitoring. Importantly, Esch never testified that the Edison fiduciaries could not have obtained waivers of the investment minimums for the institutional share classes of the William Blair Fund, the PIMCO Fund, or the MFS Total Return Fund. Instead, Esch stated that the waiver decision is made on a case-by-case basis and waivers are more likely granted when the advisor can expect a large influx of assets.

Esch testified that the only way that a fiduciary can obtain a waiver of the minimum investment criteria is if the fiduciary, or a consulting firm acting on his or her behalf, calls the fund to request a waiver. Specifically with regard to the William Blair, PIMCO, and MFS Total Return funds, Esch testified that these funds do not have any "absolute cut-offs" at which they would not consider waiving the stated investment minimums. Esch testified that his firm "automatically" calls these funds on behalf of its clients and asks if the funds will waive the investment minimums so that the clients can invest in the institutional share classes. These waiver requests are such a "standard" part of Esch's work that Esch typically will request a waiver even without asking

his client first. Further, Esch testifies that he frequently requests waivers on behalf of his clients even if they are not close to meeting the stated investment minimum. Esch has personally received waivers of investment minimums for plans as small as $50 million in total assets – i.e., 5 percent the size of the Edison Plan – and has personally obtained waivers of the minimums for clients investing in the PIMCO Fund.

While there is evidence that the PIMCO Fund and other similar mutual funds have granted waivers to large investors like the Edison Plan, there is no evidence that the funds have ever denied a request for a waiver on behalf of the Edison Plan or any other similarly-sized 401(k) Plan. Even more troubling, there is no evidence that the Plan fiduciaries, Hewitt Financial Services, or anyone else acting on behalf of the Plan ***ever even inquired*** as to whether the funds would waive the investment minimums for the institutional share classes. Finally, there is ***no*** evidence that, at the time the investments in these funds were made, the Plan fiduciaries discussed the investment minimums for the institutional share classes or that such minimums influenced their decision to invest in the retail share classes in any way.[22]

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[22] Ertel admitted at trial that there is no record of any discussion about these three mutual funds which indicates that the Plan fiduciaries decided not to invest in the institutional share classes because the Plan did not meet the required minimums.

Based on the testimony of Pomerantz and Esch, which the Court finds credible, the Court concludes that had the Plan fiduciaries requested a waiver of the minimum investments for the institutional share classes of the William Blair, PIMCO and MFS Total Return funds, the mutual funds would have waived the minimum investment requirement. At the very least, the evidence establishes that a prudent fiduciary managing a 401(k) Plan with like characteristics and aims would have inquired as to whether the mutual funds would waive the investment minimums. Defendants' failure to do so constitutes a breach of the duty of prudence.[23]

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[23] Defendants made one additional argument in support of their decision to invest in the retail share classes of the William Blair, PIMCO, and MFS Total Return Fund. Defendants' expert presented evidence that other 401(k) plans were invested in retail share classes of mutual funds. Specifically, Esch presented various surveys indicating that in 2001, 44% of mutual fund assets in 401(k) plans were invested in retail share classes, while 20% were invested in institutional shares; in 2008, 41% of mutual fund assets in 401(k) plans were in retail shares, while 29% were in institutional shares. Finally, Defendants' expert presented survey evidence indicating that in 2007, 60% of large 401(k) plans containing between $1 and $5 billion of assets (like the Edison Plan) invested in retail classes of funds, and 79% of such plans invested in institutional share classes. Defendants contend that this evidence establishes that Defendants' decision to include retail share classes in the Plan was well within the mainstream of share class decisions made by other 401(k) Plan fiduciaries.

Defendants' argument misses the point. Plaintiffs are not contending, and the Court has not found, that the mere inclusion of some retail share classes in the Plan constituted a

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In sum, the Plan fiduciaries simply failed to consider the cheaper institutional share classes when they chose to invest in the retail share classes of the William Blair, PIMCO, and MFS Total Return funds. Defendants have not offered any credible explanation for why the retail share classes were selected instead of the institutional share classes. In light of the fact that the institutional share classes offered the exact same investment at a lower fee, a prudent fiduciary acting in a like capacity would have invested in the institutional share classes. Defendants violated their duty of prudence when selecting the retail share classes of the William Blair Fund, the PIMCO Fund, and the MFS Total Return Fund. Damages resulting from the breach are discussed *infra* at Section IV.

c. Funds Added to the Plan Before August 17, 2001

The Berger (Janus) Small Cap Fund ("Janus Fund"), the PIMCO (Allianz) CCM Capital Appreciation Fund ("Allianz Fund") and the Franklin Small

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violation of the duty of prudence. The only issue here is whether it was a breach of the duty of prudence to select retail shares rather than institutional shares *of the same mutual fund* where the only difference between the two share classes was that the retail share class charged a higher fee. Defendants' survey evidence is not relevant to this issue because it does not show that similarly-situated 401(k) Plan fiduciaries invest in retail share classes *where otherwise identical cheaper institutional share classes of the same funds are available.*

(-Mid) Cap Growth Fund ("Franklin Fund")[24] were all added to the Plan in March 1999. Plaintiffs do not challenge Defendants' initial decision to invest in the retail share classes of these funds, but rather challenge Defendants' failure to convert the retail shares to institutional shares upon the occurrence of certain "triggering events' after August 2001.

i. Janus Fund

Plaintiffs contend that the Plan fiduciaries should have converted to the institutional shares of the Janus Fund in April 2003. As the findings of fact indicate, in April 2003, Stilwell Financial, which owned both the Janus and Berger families of mutual funds, reorganized several of the Berger funds into Janus and renamed the Berger Small Cap Fund to the Janus Small Cap Fund ("Janus Fund"). Plaintiffs' expert, Pomerantz, opined that with this type of name change, there could be *a potential* change in management or investment style of the fund. Pomerantz opined that, upon this name change in April 2003, a prudent fiduciary would have reviewed the fund just as if it were a new fund being added to the Plan, including a review of the fee structure and the available share classes for the fund. Pomerantz concludes that had the Plan fiduciaries done this type

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[24] As explained below, each of these funds underwent a name change after August 2001 The Court refers here to the original name of the fund, with the later name change indicated in parenthesis.

of review, they would have discovered that the cheaper institutional share class was available and would have transitioned the existing retail shares into the institutional class.

Defendants' experts disagree. Defendants' experts, John Peavy and Daniel Esch, produced undisputed evidence that although the name of the fund changed in April 2003, there were no associated changes in the fund's ownership, the management team, the investment strategy, or the market benchmarks used to evaluate the fund. The only significant change that occurred in April 2003 was that Janus acquired a 30 percent ownership in the sub-advisor of the fund, PWM. Esch testified that this type of name change would have triggered some review of whether the portfolio managers remained the same, and he certainly would have asked why the name of the fund had changed. However, because no material factor regarding investment management or strategy had in fact changed, Esch opined that there was no reason for the Plan fiduciaries to analyze the Janus Fund as if it were being added to the Plan for the first time or conduct a review of the available share classes.

The Court finds Defendants' arguments more reasonable under these facts. While it seems logical that the April 2003 name change would have triggered a duty to review whether the fund's ownership or management had changed, Plaintiffs have not explained why the April 2003 would have triggered a

review of the fund's share classes or fee structure.[25] Notably, no new assets were being mapped into the fund at that time, no new share classes were added to the fund, and there appears to be no reason for Defendants to believe that the fee structure would have changed. Further, the Plan fiduciaries did undertake a closer review of the organization and management structure of Janus Fund in April 2003, which is evidenced by the fact that the Janus Fund was placed on the Watch List at the June 2003 meeting of the Investment Committees due to "organizational issues." Plaintiffs have not presented evidence that the duty of care required anything more under the circumstances.[26]

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[25] Indeed, Pomerantz testified in his Supplemental Trial Declaration that: "[A] prudent financial expert should scrutinize an investment when there is any type of significant change to the fund, such as a potential change in portfolio management or a change in fund ownership. *In particular, a prudent financial expert should be concerned whether, under new ownership, a continuity of the underlying investment team and process will remain.*" Pomerantz does not indicate whether, and why, a prudent expert would also be concerned about the fees charged for the fund or the available share classes.

[26] Esch testified that, for his clients, he does not consider fees as part of the criteria for placing a fund on a watch list. The watch list criteria consists of "return and levels of risk a manager takes." The Plan's fiduciaries do consider the expense ratio as one of five Investment Criteria when evaluating and reviewing all funds, including those on the Watch List. However, where a fund is placed on the Watch List in connection with this type of change – where a common owner is rebranding some of its fund – Plaintiffs have not explained why a closer review of the fund's fee structure would be required.

ii. Allianz Fund

Plaintiffs make a similar argument with regard to the Allianz Fund. The fund was initially named the PIMCO CCM Capital Appreciation Fund, but was renamed the Allianz CCM Capital Appreciation Fund in April 2005. Plaintiffs' expert initially testified that the April 2005 change was the result of a change in ownership in the fund, but later admitted that, in fact, the ownership change had occurred five years earlier in 2000. Pomerantz also testified that he was not sure if there was a change in investment strategy or management of the Allianz Fund in April 2005. Nonetheless, Pomerantz opined that the name change raised *the possibility* that the fund's management or strategy would have changed, and therefore, a full diligence review of the fund was required.[27]

As is the case with the Janus Fund, Defendants presented unrebutted evidence that the ownership of the Allianz Fund did not change in April 2005, and

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[27] Plaintiffs also presented evidence that in April 2005, Allianz removed one of PIMCO's "star" fund managers, William Gross, from several of their funds. This fact is irrelevant, however, because William Gross never managed the Allianz CCM Capital Appreciation Fund. Gross was a fixed-income manager, whereas the Allianz Fund is an equity fund. Defendants' expert, Esch, opined that "it would not be a logical conclusion . . that if Bill Gross is leaving management of a fixed income fund, why that would impact the equity side of the house." As Plaintiffs have offered no contrary explanation as to why Gross's departure would affect the Allianz Fund, the Court accepts Esch's conclusion.

the management team, investment style, and market benchmarks of the fund all remained the same after April 2005. Defendants' experts opined that the change to the fund was cosmetic only and did not require a full due diligence review equivalent to that performed for a newly-added fund.

The Court accepts the conclusions of Defendants' experts. Here too, Plaintiffs' expert does not explain *why* it would be prudent to review the available share classes and fee structure of the Allianz Fund as a result of the April 2005 rebranding. Plaintiffs have presented no evidence that the April 2005 name change had any connection to a possible change in available share classes, minimum investment requirements, or the fees associated with different share classes. As with the Janus Fund, Defendants were not considering mapping any assets to the Allianz Fund in April 2005 or taking any other action that would require a review of the available share classes. Further, the Plan fiduciaries did perform a closer review of the management structure and performance of Allianz Fund after the name change, which is evidenced by the fact that the fund was placed on a Watch List in June 2005. This level of diligence appears appropriate under the circumstances.

iii. Franklin Fund

In September 2001, the Franklin Small Cap Growth Fund changed its investment strategy. In

essence, the fund changed from a small-cap growth fund, which was limited to investments in growth companies with market capitalizations not greater than $1.5 billion, to a small-midcap growth fund that could invest in growth companies with market capitalizations up to $8.5 billion. As a result of this change, the shares that the Edison Plan previously held in the Franklin Small Cap Growth Fund were automatically converted by Franklin into retail shares of the Franklin Small-Mid Cap Growth Fund.

Plaintiffs' expert opines that a change in the mandate of the fund is "quite significant" and should have triggered the Edison fiduciaries to investigate the change and do a full due diligence review of the Franklin Fund just as if the fund were being added to the Plan in the first instance. In so doing, Pomerantz contends that the Plan fiduciaries would have noted the significantly lower fees of the institutional share class and converted the retail shares at that time.

It is undisputed that the Plan fiduciaries did conduct a diligence review of the Franklin Fund as a result of the 2001 change in investment strategy. David Ertel testified that the Investments Staff reviewed the Franklin Fund in September 2001 and concluded that it still satisfied the Investment Criteria. The Investments Staff determined that the Franklin Fund should be reclassified as a mid-cap growth fund for the Plan's purposes, and also recommended adding the William Blair Small Cap Fund to the Plan's investment line-up so as to provide participants with a small-cap investment option. The

Investment Committees accepted these recommendations. Defendants also changed the communications to Plan participants to indicate that the Franklin Fund would be categorized as a "Medium U.S. Stock Fund." No new shares were added to the Franklin Fund as a result of the September 2001, and the ownership and core management of the fund remained the same. Defendants' experts opine that, given the nature of the 2001 change, no further review of the Franklin Fund was necessary under the circumstances.

The Court concludes that Plaintiffs have failed to show that this type of diligence review fell short of the standard of prudence. The fiduciaries' review of the Franklin Fund was directed toward the type of issues raised by the fund's change in investment strategy – such as whether the Plan participants should be provided with an alternative small-cap investment option. As with the Janus and Allianz funds, Plaintiffs have not explained why the Franklin Fund's September 2001 strategy change would have put Defendants on notice that they should review their original share class selection and the fees associated therewith. While Defendants' original share class selection may have been imprudent, Plaintiffs have not challenged that decision.

In sum, Plaintiffs have not met their burden of showing that a prudent fiduciary would have reviewed the available share classes and associated fees for the Janus, Allianz, and Franklin funds as a result

of the events described above. Thus, Plaintiffs' prudence claim fails with respect to these three funds.

2. Fees of the Money Market Fund

Plaintiffs' final argument is that Defendants breached their duty of prudence by requiring Plan participants to pay excessive investment management fees for the Money Market Fund. Plaintiffs contend that Defendants either: (1) should have negotiated lower fees with the investment manager of the Money Market Mutual Fund, State Street Global Advisers ("SSgA"), and that had they done so, Defendants could have secured lower fees, or (2) Defendants should have invested in a similar money market fund with another investment manager that charged lower fees. Plaintiffs contend that Defendants' failure to take either of these actions resulted in the Plan participants paying fees that were, at times, twice the amount of a reasonable fee.

As stated above, the fees charged by SSgA for the Money Market Fund were as follows: From the Plan's initial investment in the Money Market Fund in 1999 until September 2005, SSgA charged 18 basis points. In September 2005, the fees were reduced to 12 basis points and remained at 12 basis points through July 2007. From July 2007 to October 2007, SSgA charged a management fee of 10 basis points. Finally, in October 2007, the management fee was reduced to 8 basis points, where it remained as of the trial in this action.

Plaintiffs rely principally on the opinion of Dr. Pomerantz in arguing that these fees were excessive. Pomerantz opined that Defendants could have invested in a comparable money market fund that charged only 9 basis points for the entire period from 1999 to 2007. He also opined that Defendants could have secured a fee of 9 basis points from SSgA in 1999 had they inquired earlier about a reduced fee rate.

Pomerantz's opinions are not supported by the record. First, Pomerantz did not perform any type of a survey of comparable money market funds or a benchmark exercise to support his conclusion that lower fees were available from other funds. There is no evidence that the fees charged by State Street from 1999 to 2007 exceeded the **reasonable range of fees** charged by other comparable funds. In fact, the evidence is to the contrary. In late 1998 when SCE was first considering selecting a Money Market Fund for the Plan, Ertel researched four different funds, each of which charged fees between 15 to 20 basis points. Similarly, when the Plan sent out a Request for Proposal for the Trustee business, all of the candidates that responded and that offered a short-term investment fund charged fees between 15 and 20 basis points. This evidence demonstrates that the fees charged by State Street at the time of the Plan's initial investment in the Money Market Fund were well within the reasonable range of fees charged by other short-term investment funds.

Pomerantz testified that he believed that Vanguard offered a comparable money market fund that Defendants could have invested in, which charged a fee of 9 basis points from 1999 to 2007, and 8 basis points from 2007 to the present. But this conclusion is also unsupported by the evidence. Pomerantz based his argument on his review of a Vanguard prospectus which was not produced to the Court[28] or introduced at trial. In fact, the Vanguard Registration Statement from December 24, 2004, demonstrates that Vanguard's prime money market fund charged a management fee of 15 basis points in 1999 and 2000, 13 basis points in 2001, 11 basis points in 2002, 10 basis points in 2003, and 9 basis points in 2004.[29] Thus, contrary to Pomerantz's assertions, the Vanguard money market fund actually charged fees in excess of 9 basis points from 1999-2003.

Additionally, Plaintiffs have not presented evidence that the Vanguard money market fund ("Vanguard Fund") performed as well as the Money Market Fund net of fees throughout the relevant time period. Several witnesses – Ertel, Tong, and Hess – testified that when monitoring the Money Market Fund, the most important criteria is the fund's performance net of fees. Thus, while fees are certainly important, they

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[28] It may be that the document was produced among the thousands of trial exhibits submitted, but it has not been identified, nor was it discussed at trial.

[29] Plaintiffs do not dispute the accuracy of the 2004 Vanguard Registration Statement.

are only one part of the analysis; a fiduciary must look to the fund's performance as well.[30] *See Taylor v. United Technologies Corp.*, No. 3:06cv1494 (WWE), 2009 WL 535779, at *10 (D. Conn., Mar. 3, 2009) (process by which fiduciaries monitored and selected mutual funds was prudent where fiduciaries reviewed the returns of the mutual fund net of its management fee). In the case of the Money Market Fund, the evidence is undisputed that the fund performed consistently well (net of fees) throughout 1999 to 2008. In fact, the Money Market Fund was the only fund in the Edison Plan that outperformed its benchmark on a statistically significant basis from the second quarter of 1999 through the second quarter of 2008.

Pomerantz opined that the Vanguard Fund had comparable or better performance as the Money Market Fund. (Trial Exh. 341 ¶ 53 [Pomerantz Expert Report dated April 30, 2009].) However, Pomerantz based this conclusion on information obtained from the Morningstar Principia 2007 data base, which was not produced to the Court. It is not clear whether Pomerantz's opinion or the Morningstar Principia 2007 information is based on historical information – i.e. from 1999 to 2007 – or is limited to 2007 performance figures.[31] Assuming the

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[30] The Court accepts this testimony; it is both logical and unrebutted by Plaintiffs.

[31] Further, given that Pomerantz was incorrect about the amount of fees charged by the Vanguard fund over time, the

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information relates only to 2007 performance figures, there appears to be little difference between the Vanguard Fund and the Money Market Fund. Notably, by mid-2007, the Money Market Fund charged fees of 10 basis points, which dropped to 8 basis points at the end of 2007. Thus, the Money Market Fund fees were comparable to the fees charged by the Vanguard Fund in 2007. If fees and performance of the two funds were comparable in 2007, it cannot be said that Defendants acted imprudently when selecting the Money Market Fund and not the Vanguard Fund.

Plaintiffs also point to trial exhibit 1207 in support of their argument that the Plan should have invested in a money market fund that charged lower fees. Exhibit 1207 is an internal SCE report, likely created by the Investments Staff, dated April 16, 1998, which outlines potential changes to Plan's fund line-up. The report provides information regarding four separate "SSPP Money Market Funds" managed by Frank Russell, Barclays, Vanguard, and Wells Fargo. Plaintiffs note that, according to the report, Barclays offered a money market fund at 10 basis points in 1998. What Plaintiffs fail to consider is that the other three candidates all offered money market funds charging fees from 15 to 20 basis points. Moreover, the same report indicates that the Donoghue

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Court is skeptical of Pomerantz's conclusion regarding the performance of the Vanguard Fund in the absence of any documentary evidence.

Money Market Index listed fees at 30 basis points. Thus, even considering exhibit 1207, the 18 basis-point fee charged by State Street in 1998-99 appears to be well within the range of competitive, reasonable money market fund fees. Finally, although Barclays did charge lower fees in 1998, Plaintiffs have presented no evidence regarding the performance of the Barclays fund.

Moreover, even if Plaintiffs had established that the Vanguard Fund or the Barclays fund performed comparably to the Money Market Fund (which they did not), the fact that another money market fund charged lower fees (albeit not as low as Plaintiff contends) does not mean that investment in the Money Market Fund was imprudent. As the Court in *Hecker v. Deere & Co.*, 556 F.3d 575 (7th Cir. 2009), explained: "The fact that it is possible that some other funds might have had even lower [expense] ratios is beside the point; nothing in ERISA requires every fiduciary to scour the market to find and offer the cheapest possible fund (which might, of course, be plagued by other problems)." *Id.* at 586; *Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 596 n.7 (8th Cir. 2009) ("[W]e do not suggest that a claim is stated by a bare allegation that cheaper alternative investments exist in the marketplace."). ERISA does not require the [sic] a plan fiduciary select the cheapest fund available; "[r]ather, a plan fiduciary need only select funds with the care, skill, prudence and diligence of a prudent person acting in a similar role." *Renfro v. Unisys Corp.*, No. 07-2098, 2010 WL 1688540, at *5

(E.D. Pa., Apr. 26, 2010). Where the undisputed evidence establishes that the Money Market Fund significantly outperformed its market benchmarks net of fees for 9 years, and Plaintiffs can only present evidence that, at most, two money market funds charged lower fees than the Money Market Fund at some point from 1999 to 2007 while several others charged comparable or even higher fees during the same period, Plaintiffs cannot meet their burden of showing that investment in the Money Market Fund was imprudent.

Next, Plaintiffs argue that Defendants could have gotten lower fees from SSgA itself had Defendants attempted to negotiate a lower fee prior to 2005. This argument, however, is based on pure speculation. Plaintiffs did not present any witnesses from SSgA to testify as to how SSgA would have responded to a request by SCE for lower fees prior to 2005. Nor did Plaintiffs present any evidence from SSgA or any other money market fund manager regarding fee negotiations with large 401(k) plan investors during the relevant time period. Similarly, there is no evidence that SSgA charged other 401(k) plans fees lower than 18 basis points between 1999 to 2005.[32]

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[32] Plaintiffs' shortcomings in this respect are easily contrasted with the type of evidence Plaintiffs presented regarding the mutual funds' willingness to waive minimum investment requirements for the institutional share classes. With regard to that issue, the Court was presented with the Prospectuses of the

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Moreover, the fact that SSgA was amenable to a fee reduction in 2005 and again in 2007 does not mean that it would have responded likewise in the years prior. The Plan's assets in the Money Market Fund increased over time, from approximately $250 million in 2001 to approximately $650 million in 2008. As Pamela Hess testified, the rise in assets put Defendants in a better position to try and negotiate lower fees in the later years. Additionally, the market changed significantly over this time period. Defendants' expert testified that, as a general matter, management fees for money market funds have steadily decreased across the board from 1999 to 2007. Plaintiff does not dispute this trend. In light of these facts, it is equally likely (if not more so) that SSgA reduced their management fees in 2005 because the Plan continued to invest a larger number of assets in the fund and/or because the market conditions in 2005 dictated a lower fee. There is simply nothing in the record to support the assumption that

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specific mutual funds at issue, which stated that the funds would consider waiving investment minimums for institutional investors. Further, both Plaintiffs' expert and Defendants' expert testified about specific instances in which the mutual funds at issue and others like them had waived minimums for investors like the Edison Plan, and about the common practice of requesting waivers of minimum investment requiremetns [sic]. Here, in contrast, Plaintiffs have not presented any specific evidence of fee negotiations between SSgA (or other money market fund managers) and investors like the Edison Plan.

SCE could have received a fee of 9 basis points prior to 2007.[33]

Finally, Plaintiffs contend that the Plan fiduciaries failed to monitor the fees of the Money Market Fund during the relevant time period. Plaintiffs argue that there are no documents indicating that the Plan fiduciaries conducted any review of the Money Market Fund's fees prior to 2007. Plaintiffs' expert opines that a prudent fiduciary in Defendants' position would have negotiated a sliding fee scale agreement with SSgA, such that the management fee for the fund would automatically reduce at scheduled breakpoints as the Plan's assets in the fund grew.

These arguments lack merit. First, as the findings of fact indicate, Defendants did periodically review the reasonableness of the fees for the Money Market Fund. When the Money Market Fund was first chosen in 1999, Ertel had reviewed and

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[33] Plaintiffs in large part rely upon the email from Pam Hess to Marvin Tong dated April 27, 2007 (Trial Exh. 278) for the proposition that SSgA would have lowered its management fees prior to 2007 had SCE asked them to do so. However, Hess's email does not support Plaintiff's position. In the email, Hess speaks only in the present tense, and does not discuss historical fee rates for the Money Market Fund. Thus, while Hess suggests that, as of April 2007, SCE possibly could negotiate a fee of 8-9 basis points, she does not suggest that such a fee would have been available at an earlier time. To the contrary, Hess testified that when she first started advising SCE in late 2004, she thought the fees for the Money Market Fund – then at 18 basis points – were reasonable and competitive.

compared the fees of four comparable money market funds. The Plan fiduciaries also reviewed the comparable money market funds (including fees) of seven candidates that responded to a Request For Proposal for the trustee business. The Money Market Fund fees charged by SSgA were comparable to those of the RFP candidates. Thereafter, the Investments Staff consistently monitored the Money Market Fund's performance net of fees on a monthly, quarterly, and annual basis. In January 2003, when Marvin Tong joined the Investments Staff, he reviewed the fees of the Money Market Fund, and based on his prior experience in the investment consulting field, he concluded that the fees were reasonable. Thereafter, in 2005 and 2007, Tong had discussions with Pamela Hess from HFS in which Hess indicated that she had reviewed the Money Market Fund fees and thought a lower fee could be negotiated. In each of those instances, the Money Market Fund fee was reduced, first to 12 basis points in 2005, and then to 10 and 8 basis points in 2007. Finally, in 2008, the Investments Staff conducted an extensive review of the Money Market Fund.

As to Plaintiffs' contention that Defendants should have negotiated a sliding fee arrangement, Hess testified that not all managers allow for such an arrangement. Plaintiffs have presented no evidence that SSgA would have agreed to such an arrangement or that SSgA had negotiated sliding fee agreements with other 401(k) plan. Furthermore, it is undisputed that the management fee was periodically reduced as

the Plan's assets in the Money Market Fund increased. Thus, while Defendants may not have had an agreement for lock-step reductions in the fee as the assets grew, the actual fee reductions are roughly consistent with such a pattern.

However, even if Defendants' process for monitoring and negotiating the fees for the Money Market Fund was somehow deficient, Plaintiffs' claim for damages fails if a hypothetical prudent fiduciary would have made the same investment decision. *Howard v. Shay,* 100 F.3d 1484, 1489 (9th Cir. 1996); *Roth v. Sawyer-Cleator Lumber Co.,* 16 F.3d 915, 919 (8th Cir. 1994); *Fink v. National Savings and Trust Co.,* 772 F.2d 951, 962 (D.C. Cir. 1985) (Scalia, J., concurring). For the reasons stated above, Plaintiffs cannot show that the fees for the Money Market Fund exceeded the reasonable range of fees for comparably performing money market funds or that the decision to select and maintain the Money Market Fund was otherwise objectively imprudence [sic]. Thus, Plaintiffs' prudence claim fails with regard to the Money Market Fund.

IV. DAMAGES AND OTHER RELIEF

Defendants' decisions to invest in the retail share classes rather than the institutional share classes of the William Blair Fund, the PIMCO Fund, and the MFS Total Return Fund caused the Plan participants substantial damages. However, due to certain errors in the Plaintiffs' damages calculations and the fact that Defendants did not present damage calculations for these funds from July 2002 forward, the Court

cannot calculate with accuracy the exact amount of damages at this time. Thus, the Court will allow Plaintiffs to submit revised damage calculations in accordance with the following guidelines.

The Court concludes that, despite the stated mandatory minimum investments for the institutional share classes, Defendants could have invested in the institutional share classes of the William Blair, PIMCO, and MFS Total Return funds at the time the funds were first added to the Plan. Thus, for each of the three funds, damages should run from the date the Plan initially invested in the funds, July 2002, to the present.[34]

Plaintiffs and Defendants in most respects do not differ in the methodology that should be used to calculate damages. To the extent such differences exist, the Court will address them below. The following methodology should be used for each of the three funds: First, Plaintiffs should identify and measure the difference in investment fees between the retail share classes included in the Plan and the less expensive institutional share classes that were available but not selected for the Plan. Second, Plaintiffs should calculate the average asset levels for each year that the Plan was invested in the funds. Rather than

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[34] To the extent that Plaintiffs need additional information from Defendants to calculate damages from January 2010 forward, Defendants shall cooperate with Plaintiffs and provide such information forthwith.

using the average year-end asset balance to calculate the average annual asset level, Plaintiffs should use the *monthly asset balances* for the months of the year in which the Plan was invested in the retail share classes to calculate an average annual asset level for that year.[35] Third, Plaintiffs should multiply (a) the difference between the fees charged for the retail share classes actually offered in the Plan and the fees

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[35] The Court adopts this method, which was put forth by Defendants, so as to resolve an overstatement in Plaintiffs' calculations for the PIMCO RCM Global Tech Fund ("the PIMCO Fund"). Plaintiffs calculated the average annual assets for each fund by taking the average of the year-end assets and the previous-year-end assets. With regard to the PIMCO Fund, however, the year-end asset level for 2003 was $43.9 million, the bulk of which was due to the mapping of approximately $40 million in assets from the T. Rowe Price Science & Technology Fund into the PIMCO Fund. That $40 million influx of assets from the T. Rowe Price Fund, however, was never invested in the retail share class of the PIMCO Fund. At the time of the mapping in October 2003, the Plan fiduciaries converted all the shares in the PIMCO Fund to institutional shares. Thus, because the $40 million dollars in assets from the T. Rowe Price Fund were never invested in retail shares, they should not be used as a basis for calculating damages due to Defendants' imprudence in selecting the retail share class. Plaintiffs must exclude the amount of assets in the PIMCO Fund in 2003 that were only invested in institutional shares (the approximately $40 million in funds mapped from the T. Rowe Price Fund) when calculating the average asset level.

The Court believes that by using the average monthly asset levels for the months of the year during which the Plan was invested in the retail share classes of the funds, this will provide a more accurate level of damages attributable to the imprudent investment in retail shares.

charged for the less expensive institutional share classes by (b) the average annual fund assets, to determine the actual damages attributable to the higher fees.

Finally, damages should account for the fact that had the Plan fiduciaries not invested in the more expensive retail share classes, the Plan participants would have had more money invested and therefore would have earned more money over the course of time, so called "lost investment opportunity." In calculating lost investment opportunity, Plaintiffs should use the returns of the funds in which the assets actually are (and have been) invested.[36] For example, the MFS Total Return Fund was removed from the Plan in October 2008 and replaced by the Russell Balanced Moderate Growth Portfolio. The assets for the MFS Total Return Fund were mapped into the Russell Balanced Moderate Growth Portfolio in October 2008; thus, Plaintiffs should use the Russell Balanced Moderate Growth Portfolio returns to calculate lost investment opportunity from October 2008 forward. Similarly, because the Plan switched the assets in the PIMCO Fund from retail shares to institutional shares in October 2003, Plaintiffs should use the institutional share class returns when calculating lost investment opportunity from October 2003 forward.

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[36] This approach was adopted by Defendants in their proposed calculations, but not by Plaintiffs. The Court finds that this is a more accurate way of calculating actual lost investment opportunity.

Plaintiffs shall provide updated damage calculations in accordance with these principles within 20 days of the date of this Order.

Finally, to the extent any of the three funds at issue continue to be invested in retail share classes and cheaper but otherwise identical investments are available in the institutional share classes of those same funds, Defendants shall take steps to remedy the situation consistent with this Order so as to eliminate future damage to the Plan participants.

V. CONCLUSION

For the reasons stated above, the Court rules as follows:

Defendants did not breach their duty of loyalty under ERISA by investing in retail share classes rather than institutional share classes of the William Blair Small Growth Fund, the PIMCO RCM Global Tech Fund, the MFS Total Return A [sic] Fund, the Franklin Small Mid-Cap Growth Fund, the Janus Small Cap Investors Fund, and the Allianz CCM Capital Appreciation Fund.

Defendants breached their duty of prudence under ERISA by investing in retail share classes rather than institutional share classes of the William Blair Fund, the PIMCO Fund, and the MFS Total Return Fund. Plaintiffs shall have 20 days from the date of this Order to submit updated damage calculations reflecting the amount of damages resulting from

the excess fees incurred in connection with investment in the institutional share classes of these funds, including lost investment opportunity, from July 2002 to the present.

Defendants did not breach their duty of prudence in failing to review the available share classes and failing to switch to the institutional share classes of the Janus Small Cap Investors Fund in April 2003, the Allianz CCM Capital Appreciation Fund in April 2005, or the Franklin Small-Mid Cap Growth Fund in September 2001.

Finally, Defendants did not breach their duty of prudence by investing in the Money Market Fund managed by SSgA or by failing to negotiate a different management fee for the Money Market Fund at any point from 1999 to the present.

Plaintiffs shall submit a proposed judgment consistent with this Order (and the updated damage calculations), and consistent with the Court's prior rulings on Defendants' motion for summary judgment issued on July 16, 2009 and July 31, 2009, within 20 days of the date of this Order.

IT IS SO ORDERED.

DATED: 07/08/10

/s/ Stephen V. Wilson
STEPHEN V. WILSON
UNITED STATES
DISTRICT JUDGE

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA.

GLENN TIBBLE, et al., Plaintiffs, v. EDISON INTERNATIONAL, et al., Defendants.	CV 07-5359 SVW (AGRx) ORDER DENYING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT; ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT IN PART [143] [145] [146] [147] [156] [186] [188]

I. INTRODUCTION

Plaintiffs filed this Motion for Partial Summary Judgment seeking a judgment in their favor with regard to certain alleged prohibited transactions and alleged violations of the Plan documents. In response, Defendants have moved for Summary Judgment as to all of Plaintiffs' claims. For the reasons stated below, Plaintiffs' Motion is DENIED, and Defendants' Motion is GRANTED with regard to several claims. The Court finds that triable issues remain with regard to whether certain fiduciaries breached their duty of loyalty by choosing mutual funds in order to maximize the amount of revenue sharing for SCE's benefit, instead of for the benefit of the Plan participants. In addition, because Plaintiffs have not adequately described their prohibited transaction claims arising

out of State Street's retention of float, the Court ORDERS further briefing on those issues.

II. FACTS

Plaintiffs Glenn Tibble, William Bauer, William Izral, Henry Runowiecki, Frederick Sohadolc, and Hugh Tinman, Jr. ("Plaintiffs") are current or former employees and participants in the Edison 401(k) Savings Plan (the "Plan"). The Plan is a "defined contribution plan" within the meaning of 29 U.S.C. § 1102(34). (Def.'s Statement of Uncontroverted Facts ("SUF") ¶ 1.) As of 2007, the Plan held $3.8 billion in assets for the benefit of approximately 20,000 participants. (Pl.'s Statement of Uncontroverted Facts ("PSUF") ¶ 7.)

Plaintiffs have named as defendants in this action several different entities and individuals, all of whom are alleged to have been Plan fiduciaries during the relevant time period. Defendant Edison International ("Edison") is the parent corporation of Defendant Southern California Edison ("SCE"). (SUF ¶ 5.) Plaintiffs allege that Edison and SCE are the Plan sponsors. (Second Am. Compl. ("SAC") ¶ 12.) Another Defendant is the SCE Benefits Committee ("Benefits Committee"), which is a named fiduciary under the Plan, the Plan Administrator, and comprised of individuals appointed by SCE's Chief Executive Officer ("CEO"). (*Id.* ¶ 15.) Also named as a Defendant is the Edison International Trust Investment Committee ("TIC"), which is a named fiduciary

under the Plan and is comprised of individuals also appointed by SCE's CEO. (*Id.* ¶ 16.) The Secretary of the Benefits Committee, who as of 2005 was Aaron Whitely, is a named defendant. (*Id.* ¶ 17.) Plaintiffs also name SCE's Vice President of Human Resources as a defendant. (*Id.* ¶ 18.) Finally, Plaintiffs name SCE's Manager of the Human Resource Service Center as a defendant given her position as a named fiduciary of the Plan. (*Id.* ¶ 19.)

In 1998, SCE and the unions representing SCE employees began collective bargaining negotiations. (SUF ¶ 10.) As a result of these negotiations, the investment options included in the Plan were altered significantly. (*Id.* ¶ 12.) Before these changes occurred, the Plan offered employees the following six investment options: (1) Bond Fund, (2) Balanced Fund, (3) Global Stock Fund, (4) Money Market Fund, (5) Common Stock Fund, and (6) the Edison Stock Fund. (*Id.* ¶ 6.) After the negotiations were completed, however, and changes were made to the Plan, it offered a much broader array of up to fifty investment options including the following: (1) Edison Stock Fund; (2) Conservative Growth Fund; (3) Balanced Moderate Growth Fund; (4) Aggressive Growth Fund; (5) Money Market Fund; (6) Bond Fund; (7) U.S. Stock Index Fund; (8) U.S. Large Company Stock Fund; (9) International Stock Fund; and (10) the Mutual Fund Menu, which included approximately forty "retail" mutual funds. (Decker Decl., Ex. N.)

The Conservative Growth Fund, the Balanced Moderate Growth Fund, and the Aggressive Growth

Fund were "pre-mixed" portfolios consisting of a combination of stocks and bonds, which allow the participants to diversify within one investment option. (SUF ¶ 24.) The U.S. Stock Index Fund, U.S. Large Company Stock Fund, and International Stock Fund were low-cost index funds provided by the Frank Russell Trust Company ("Russell"). (*See* Niden Rep., Ex. C.) The Mutual Fund Menu consisted of so-called "retail" mutual funds – that is, mutual funds that were also available to the general public – such as Vanguard, T. Rowe Price, and Fidelity. (*Id.*)

In February 2000, as a result of the collective bargaining process, the Plan was amended to reflect the agreement reached between the parties. (Decker Decl., Ex. K.) One component of this amendment was that SCE agreed to provide a "[b]roader range of investment options," including "a mutual fund window with access to 40 additional funds." (*Id.*) The amendment also provided that SCE would allow for "[m]ore frequent and timely transactions," including the ability to make daily fund transfers. (*Id.*)

The Benefits Committee and TIC perform defined roles with respect to the Plan. The Benefits Committee is responsible for overseeing how the Plan is operated and administered, and is responsible for adopting Plan amendments. (SUF ¶¶ 41-42.) The TIC is responsible for establishing investment guidelines and for making other investment decisions for the Plan. (*Id.* ¶ 45.) The TIC has also delegated certain investment responsibilities to the TIC Chairman's Subcommittee ("Sub-TIC"), which focuses on the

selection of specific investment options. (*Id.* ¶ 47.) The Sub-TIC also receives advice on investment options and their performance from the Investments Staff. (*Id.* ¶ 49.)

A. Hewitt

Even before the changes to the Plan in 1999, the Plan's recordkeeping services had been provided by Hewitt Associates LLC ("Hewitt"). (PSUF ¶ 14.) Beginning in at least 1997, the Plan stated that SCE would pay "the cost of the administration of the Plan." (*See* Pl.'s, Ex. 1, at 48.) This language remained in the Plan until 2006, when the Plan was amended to state that SCE would pay "the cost of the administration of the Plan, *net of any adjustments* by service providers." (Decker Decl., Ex. MM, at 33 (emphasis added).)

Before the addition of the mutual funds in 1999, SCE paid the entire cost of Hewitt's recordkeeping services. With the addition of the retail mutual funds to the Plan, however, certain "revenue sharing" was made available that could be used in order to pay for part of Hewitt's recordkeeping expenses. Revenue sharing is a general term that refers to the practice by which mutual funds collect fees from mutual fund assets and distribute them to service providers, such as recordkeepers and trustees – services that the mutual funds would otherwise provide themselves.

(*See* Niden Rep. ¶ 18.)[1] Revenue sharing comes from so-called "12b-1" fees, which are fees that mutual fund investment managers charge to investors in order to pay for distribution expenses and shareholder service expenses. *See Meyer v. Oppenheimer Mgmt. Corp.*, 895 F.2d 861, 863 (2d Cir. 1990). 12b-1 fees receive their name from SEC Rule 12b-1, which was promulgated pursuant to the Investment Company Act of 1940 ("ICA"). *See* 17 C.F.R. § 270.12b-1(b). The ICA generally bans the use of fund assets to pay the costs of fund distribution. In 1980, however, the SEC adopted Rule 12b-1 which specifies certain conditions that must be met in order for mutual fund advisers to be able to make payments from fund assets for the costs of marketing and distributing fund shares. *See Meyer*, 895 F.2d at 863. Other fees included under the umbrella of revenue sharing are "sub-transfer agency" fees. These fees are similar in many respects to 12b-1 fees but are paid to third parties in order to track the accounts of individual participants. (Niden Rep. ¶ 18.)

Each type of fee is collected out of the mutual fund assets, and is included as a part of the mutual

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[1] In a recent report from the Department of Labor ("DOL"), the Working Group noted that "in the employee benefit community, the term 'revenue sharing' is used loosely to describe virtually any payment that a plan service provider receives from a party other than the plan." Report of the Working Group on Fiduciary Responsibilities & Revenue Sharing Practices, Department of Labor (June 18, 2009), *available at* http://www.dol.gov/ebsa/publications/AC-1107b.html.

fund's overall expense ratio. (*See* Pomerantz Rep. ¶ 2.) The expense ratio is the overall fee that the mutual fund charges to investors for investing in that particular fund.[2] The expense ratio is essentially a flat fee, which has a component for 12b-1 or sub-transfer agency fees, as well as other aspects such as a management fee, which is essentially the fee investors pay for the manager's expertise. (Pomerantz Rep. ¶ 2.) These fees are deducted from the mutual fund assets before any returns are paid out to the investors.

In 1999, when retail mutual funds were added to the Plan, Hewitt already had contracts with certain mutual fund companies, whereby Hewitt received a portion of the revenue sharing to pay for Hewitt's recordkeeping services. As a result, when the retail mutual funds were added to the Plan, some of the revenue sharing was used to pay for Hewitt's recordkeeping costs. (SUF ¶ 30.) Hewitt then billed SCE for Hewitt's services after having deducted the amount received from the mutual funds from revenue sharing. (*See* Pl.'s Ex. BB.) Hewitt did not have preexisting relationships with certain mutual funds, however, and as a result, contracts were entered into so that the revenue sharing could be captured from the mutual funds and be directed to offset the cost of Hewitt's services. (*See* Pl.'s Ex. P.) Oftentimes, these

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[2] *See* Fact Sheet: Report on Mutual Fund Fees & Expenses, Securities & Exchange Commission (January 10, 2001), *available at* http://www.sec.gov/news/extra/mfeefaq.htm.

contracts provided that an increasing percentage of revenue sharing would be paid to Hewitt, if the Plan invested increasing assets in mutual funds provided by that specific company. (*Id.*)

The use of revenue sharing to offset Hewitt's recordkeeping costs was discussed during the collective bargaining with the employee unions. (SUF ¶ 38.) Furthermore, this arrangement was disclosed to the Plan participants on approximately seventeen occasions after the practice began in 1999. (*See id.* ¶ 32.)

B. State Street

State Street Bank ("State Street") became the Plan trustee in 1999. (SUF ¶ 85.) The "Trust Agreement" entered into between State Street and SCE provided that State Street would be compensated at a flat rate of $150,000 per year for its services. (*Id.* ¶ 89.) As part of its duties, State Street was responsible for making disbursements to the Plan participants when they sought to remove assets from the Plan. (*See* Ertel Decl., Ex. J, at 6.) In the time between when the cash was sent to State Street for disbursement, and when the Plan participant actually deposited the check, State Street earned interest on the cash in its possession. (SUF ¶ 91.) This interest is referred to as "float." The Trust Agreement did not expressly address who should receive the benefit of such float. (*See* Ertel Decl., Ex. J.) In 2006 alone,

State Street retained $383,637 from float on cash from the Plan.

III. ANALYSIS

A. Legal Standard

Rule 56(c) requires summary judgment for the moving party when the evidence, viewed in the light most favorable to the nonmoving party, shows that there is no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56(c); *Tarin v. County of Los Angeles*, 123 F.3d 1259, 1263 (9th Cir. 1997).

The moving party bears the initial burden of establishing the absence of a genuine issue of material fact. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986). That burden may be met by "'showing' – that is, pointing out to the district court – that there is an absence of evidence to support the nonmoving party's case." *Id.* at 325. Once the moving party has met its initial burden, Rule 56(e) requires the nonmoving party to go beyond the pleadings and identify specific facts that show a genuine issue for trial. *See id.* at 323-34; *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). "A scintilla of evidence or evidence that is merely colorable or not significantly probative does not present a genuine issue of material fact." *Addisu v. Fred Meyer*, 198 F.3d 1130, 1134 (9th Cir. 2000). Only genuine disputes – where the evidence is such that a reasonable jury could return a verdict for the nonmoving party – over facts that

might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. *See Anderson*, 477 U.S. at 248; *Aprin v. Santa Clara Valley Transp. Agency*, 261 F.3d 912, 919 (9th Cir. 2001) (the nonmoving party must identify specific evidence from which a reasonable jury could return a verdict in its favor).

B. ERISA's Fiduciary Duties

Plaintiffs bring this action pursuant to § 502(a) of ERISA, which allows "a participant, beneficiary or fiduciary" to bring an action for breach of fiduciary duty.[3] 29 U.S.C. § 1132(a)(2). Specifically, the statute provides:

> Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets by the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the

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[3] Plaintiffs also allege a claim pursuant to 29 U.S.C. § 1132(a)(3), which allows a participant to bring an action to enjoin any act that violates the terms of the plan, to enforce the terms of the plan, or to obtain other appropriate equitable relief.

> court may deem appropriate, including removal of such fiduciary.

Id. § 1109(a).

ERISA details the general duty of loyalty and care owed by a plan fiduciary to its participants. *See* 29 U.S.C. § 1104. The statute requires a plan fiduciary to discharge his duties solely in the interest of the plan participants and beneficiaries and for the exclusive purpose of providing benefits to participants and their beneficiaries, and defraying reasonable expenses of administering the plan. *Id.* § 1104(a)(1)(A). The fiduciary shall use the amount of "care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims." *Id.* § 1104(a)(1)(B). Furthermore, a plan fiduciary must discharge his duties "in accordance with the documents and instruments governing the plan." *Id.* § 1104(a)(1)(D).

ERISA also lists a number of "prohibited transactions," which are pre [sic] se prohibited. *See id.* § 1106. The statute provides:

> (a) Except as provided in section 1108 of this title:
>
> > (1) A fiduciary with respect to a plan shall not cause the plan to engage in a transaction, if he or she knows or should know such transaction constitutes a direct or indirect –

(A) sale or exchange, or leasing, of any property between the plan and a party in interest;

(B) lending of money or other extension of credit between the plan and a party in interest:

(C) furnishing of goods, services, or facilities between the plan and a party in interest;

(D) transfer to, or use by or for the benefit of a party in interest, of any assets of the plan; or

(b) A fiduciary with respect to a plan shall not –

(1) deal with the assets of the plan in his own interest or for his own account,

(2) in his individual or in any other capacity act in any transaction involving the plan on behalf of a party (or represent a party) whose interests are adverse to the interests of the plan or the interests of its participants or beneficiaries, or

(3) receive any consideration for his own personal account from any party dealing with such plan in connection with a transaction involving the assets of the plan.

Id. § 1106(a)-(b).

A "party in interest" is defined broadly to include "any fiduciary, a person providing services to the

plan, an employer whose employees are covered by the plan, and certain shareholders and relatives." *Chao v. Hall Holding Co., Inc.*, 285 F.3d 415, 424 (6th Cir. 2002); *Kanawi v. Bechtel Corp.*, 590 F. Supp. 2d 1213, 1222 (N.D. Cal. 2008) (Citing *Hall*). Section 1106(b) "creates a per se ERISA violation; even the absence of bad faith, or in the presence of a fair and reasonable transaction, [§ 1106(b)] establishes a blanket prohibition of certain acts, easily applied, in order to facilitate Congress' remedial interest in protecting employee benefit plans." *Patelco Credit Union v. Sahni*, 262 F.3d 897, 911 (9th Cir. 2001).

With regard to certain prohibited transactions, ERISA includes a number of different exemptions from liability, which are found at § 1108(b). *See id.* These exemptions include one for "reasonable arrangements with a party in interest" for "services necessary for the establishment or operation of the plan" so long as "no more than reasonable compensation is paid therefor." 29 U.S.C. § 1108(b)(2).

C. Statute of Limitations

A brief discussion of the statute of limitations is necessary as a preliminary matter because it is relevant to many of Plaintiffs' claims. For claims alleging breach of fiduciary duty, ERISA provides:

> No action may be commenced under this subchapter with respect to a fiduciary's breach of any responsibility, duty, or obligation

> under this part, or with respect to a violation of this part, after the earlier of –
>
> > (1) six years after (A) the date of the last action which constituted a part of the breach or violation, or (B) in the case of an omission, the latest date on which the fiduciary could have cured the breach or violation, or
> >
> > (2) three years after the earliest date on which the plaintiff had actual knowledge of a breach or violation; except that in the case of fraud or concealment, such action may be commenced no later than six years after the date of discovery for such breach or violation.

29 U.S.C. § 1113.

Under this framework, the default statute of limitations is six years. In order to extend the statute of limitations beyond six years, the plaintiff must prove that the defendant "made knowingly false misrepresentations with the intent to defraud the plaintiffs," or took "affirmative steps" to conceal its own alleged breaches. *Barker v. Am. Mobil Power Corp.*, 64 F.3d 1397, 1401 (9th Cir. 1995) (per curiam). On the other hand, in order to shorten the statute of limitations to three years, the defendant has to prove that the plaintiff had "actual knowledge" of the violation. Under this actual knowledge standard, "[t]he statute of limitations is triggered by defendants' knowledge of the transaction that constituted

the alleged violation, not by their knowledge of the law." *Blanton v. Anzalone*, 760 F.2d 989, 992 (9th Cir. 1985).

There is no "continuing violation" theory to claims subject to ERISA's statute of limitations. *Phillips v. Alaska Hotel & Rest. Employees Pension Fund*, 944 F.2d 509, 520 (9th Cir. 1991). In *Phillips*, the court rejected the notion that after the first alleged breach of fiduciary duty, that any failure to rectify the breach constituted another discrete breach. *Id.* The court said that although the trustee's conduct could be viewed as a series of breaches, the statute of limitations did not begin anew because each breach was "of the same character." *Id.*

Here, neither party has satisfied its burden to alter the statute of limitations from the standard six year time limit. Plaintiffs have not shown that Defendants made any misstatements or actively concealed any breaches of fiduciary duty, which would toll the statute beyond six years. In fact, the evidence shows that Defendants disclosed the existence of the revenue sharing with Plaintiffs on several occasions. (*See* SUF ¶ 32.) With regard to Plaintiffs' claims for breach of the duty of loyalty, Plaintiffs have not presented evidence that Defendants actively concealed such breaches. *See Kanawi*, 590 F. Supp. 2d at 1226 ("The failure of a fiduciary to disclose a self-interest in transactions that were allegedly harmful to a plan 'does not rise to the level of active concealment, which is more than merely a failure to disclose.'")

(quoting *Schaefer v. Arkansas Med. Soc.*, 853 F.2d 1487, 1491 (8th Cir. 1988)).

Defendants have similarly failed to present undisputed evidence that Plaintiffs had actual knowledge of the alleged breaches of fiduciary duty. As a result, for the most part, Plaintiffs' claims will be limited to those that accrued within six years of the filing of this suit, which was August 16, 2001. In the context of a prohibited transactions, the statute of limitations typically begins when the "transaction" takes place. *See Martin*, 828 F. Supp. at 1431. The Court will address statute of limitations issues as they arise in the following analysis of Plaintiffs' claims.

D. Prohibited Transactions – Hewitt

Plaintiffs argue that Defendants' fee arrangement with Hewitt amounted to a prohibited transaction under § 1106(b) in two ways. First, Plaintiffs argue that Defendants violated § 1106(b)(3) by receiving consideration on Defendants' personal account from a party dealing with such plan in connection with a transaction involving the assets of the Plan. Second, Plaintiffs argue that Defendants violated § 1106(b)(2) by acting in a transaction involving the Plan on behalf of a party whose interests are adverse to the interests of the plan.

1. § 1106(b)(3)

The statute makes it per se illegal for any fiduciary to "receive any consideration for his own personal account from any party dealing with such plan in connection with a transaction involving the assets of the plan." 29 U.S.C. § 1106(b)(3). Plaintiffs contend that SCE, as a fiduciary, was receiving consideration from the mutual funds in the form of a credit to SCE's monthly account with Hewitt. In the language of the statute therefore, Plaintiffs allege that SCE (the "fiduciary") was receiving revenue sharing offsets ("consideration") from the mutual funds ("party dealing with such plan"). With regard to the "transaction" involving assets of the plan, Plaintiffs propose two possible transactions: (1) the contracts between the Plan and the mutual funds directing the mutual funds to pay revenue sharing to Hewitt, or (2) the transactions whereby the mutual funds were added as investment options in the Plan.

Plaintiff's theory fails, however, because in order to be liable for a violation of § 1106(b)(3), the fiduciary receiving the "consideration" must have had control over the "transaction" in question. *See Lockheed Corp. v. Spink*, 517 U.S. 882, 888 (1996) (noting that in order for there to be a violation of § 1106, "a plaintiff must show that a fiduciary caused the plan to engage in the allegedly unlawful transaction"); *Wright v. Oregon Metallurgical Corp.*, 360 F.3d 1090, 1101 (9th Cir. 2005) (citing *Spink* and rejecting prohibited transaction claim because the defendant's

actions did "not constitute those of a fiduciary or even a de facto fiduciary").

For example, in *Martin v. National Bank of Alaska*, 828 F. Supp. 1427 (D. Alaska 1992), the plaintiff alleged that the defendant fiduciary, a bank, was receiving loan origination fees from loans to third parties made out of the plan assets. *Id.* at 1437. The court had little trouble finding that the loans were transactions involving assets of the plan because the fiduciary bank was making the loans out of the plan assets. *Id.* at 1438. Moreover, the fiduciary bank was receiving consideration – the loan origination fees – in connection with making the loans out of the plan assets to the third parties. *Id.* Since there was no applicable exemption, the court found that the fiduciary bank had violated § 1106(b)(3). *Id.*

Similarly, in *Stuart Park Associates L.P. v. Ameritech Pension Trust*, 846 F. Supp. 701 (N.D. Ill. 1994), the issue was whether the plan fiduciary, Thompson, was personally receiving fees from Bennett in exchange for Thompson's influencing the plan to invest in a real estate project promoted by Bennett. *Id.* at 706. The court found that there was "an illegal kickback scheme" whereby Thompson exercised his influence to get the plan to invest in transactions involving Bennett and, in exchange, Bennett paid Thompson approximately $40,000. *Id.* Thus, the court found that Thompson had violated § 1106(b)(3) by

receiving consideration for his influence from a party dealing with the plan. *Id.*[4]

Martin and *Stuart Park* are classic examples of a fiduciary exercising his control over the assets of the plan, and, as a direct result, receiving consideration from a third party. These cases fall squarely within the scope of the statute, which prohibits fiduciaries from "receiv[ing] any consideration for his own personal account from any party dealing with such plan in connection with a transaction involving the assets of the plan." 29 U.S.C. § 1106(b)(3). Indeed, such a self-dealing transaction is precisely the type of transaction that § 1106(b)(3) was designed to prevent. *See Lowen v. Tower Asset Management, Inc.*, 829 F.2d 1209, 1212 (2d Cir. 1987); *Patelco*, 262 F.3d at 909.

Here, however, unlike the defendants in both *Martin* and *Stuart Park*, the party receiving the benefit from the transaction was SCE.[5] Yet SCE was not the party engaging in the transactions that resulted in the "consideration" (revenue sharing) being generated. Plaintiffs have presented no evidence

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[4] The district court's decision was affirmed on appeal without much discussion of this issue. *See Stuart Park Assocs. Ltd. P'ship v. Ameritech Pension Trust*, 51 F.3d 1319, 1325 (7th Cir. 1995).

[5] The alleged "consideration" according to Plaintiffs was a "credit to [the] monthly service account with Hewitt." (Mot., at 16.) The only party to contract with Hewitt was SCE. (*See* Pl.'s Ex. L1.) Plaintiffs have not presented any evidence that any other fiduciary received "consideration" from these mutual fund revenue sharing offsets.

that SCE made the decisions that resulted in the generation of revenue sharing from the mutual funds. There is no evidence, for example, that SCE itself influenced whether to enter into the service contracts with the mutual funds or whether certain mutual funds would become investment options for the fund. Rather, the evidence presented indicates that these decisions were made by the TIC or the Benefits Committee, both of which were independent committees whose purpose was to provide prudent and wise investment options for the exclusive benefit of the Plan participants. (*See* Pl.'s Exs. N & P; SUF ¶ 45.)[6] Thus, because Plaintiffs have not presented any evidence that SCE made the decisions that brought about the revenue sharing, Plaintiffs are not entitled to summary judgment on this claim.

Both *Martin* and *Stuart Park* relied on an earlier Second Circuit opinion *Lowen*, 829 F.2d 1209. There, the court found that a group of related companies (Tower Asset, Tower Capital, and Tower Securities (collectively, the "Tower entities")), along with their principals, had engaged in numerous prohibited transactions in violation of § 1106(b)(3). *Id.* at 1213. Tower Asset was a fiduciary to the plan and provided the plan with investment advice. *Id.* at 1219. The

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[6] The contracts with the mutual funds were entered into by the Benefits Committee on behalf of the Plan. (*See* Pl.'s Ex. N & P.) The contracts with Fidelity and T. Rowe Price were both signed by A. Lou Whitely as Secretary of the Benefits Committee. (*Id.*)

prohibited transactions typically involved one of the sister companies, either Tower Capital or Tower Securities, which entered into a contract with new company to advise the company and to provide the start-up capital that the company needed. *Id.* at 1214. These new companies were typically also owned either in whole or in part by the principals of the Tower entities. *Id.* Tower Capital or Tower Securities then arranged for Tower Assets to invest the assets of the plan in the start-up company, thereby generating fees and commissions for Tower Capital and Tower Securities. *Id.* The court declined to decide whether Tower Asset's sister companies were fiduciaries of the plan, because the court simply disregarded the corporate form of the separate companies. *Id.* at 1220-21. The court found that "[t]he record demonstrates beyond dispute extensive intermixing of assets among the corporations, and among the corporations and individual defendants, without observing the appropriate formalities." *Id.* at 1221. Thus, the court found that all of the defendants were effectively liable for breach of § 1106(b)(3) because they all received consideration in the form of fees, commissions, and stock from the companies who were using the plan assets as start-up capital. *See id.*

Much like the defendants in *Martin* and *Stuart Park*, in *Lowen*, the defendants who received the benefits from the transactions involving the plan were also the entities that were exerting influence on the plan to enter into those transactions. Although Tower Capital and Tower Securities were typically

the entities orchestrating the transaction, Tower Asset was deeply involved as well. Furthermore, the court disregarded the distinctions between the different entities and essentially consolidated the entities into one by virtue of the complete overlap between them and the fact that the individual defendants "personally and actively dominated those firms." As a result, the court found that the Tower entities were collectively engaging in the transactions with the plan assets, while at the same time benefitting from those transactions.

Lowen supports a finding that SCE is not liable for violating § 1106(b)(3) because, on the evidence presented by Plaintiffs, SCE was simply a recipient of the benefit from the revenue sharing, but it was the Benefits Committee and the TIC that caused the Plan to transact with the mutual funds. Plaintiffs have not pointed to any evidence similar to that in *Lowen* that would justify disregarding the separate legal structures of SCE, the TIC, the Sub-TIC, and/or the Benefits Committee. *See Collins v. Pension & Ins. Comm. of S. Cal. Rock Prods. & Ready Mixed Concrete Ass'ns*, 144 F.3d 1279, 1282 (9th Cir. 1998) ("The existence of an alter ego relationship is not presumed without proof of specific facts to support these theories.").

The requirement that the fiduciary receiving the benefit from the transaction also be the fiduciary exercising control over the transaction is also

supported by Department of Labor ("DOL") Advisory Opinions interpreting the scope of § 1106(b)(3).[7] The DOL issued two Advisory Opinions in 1997 involving the question of whether a fiduciary receiving revenue sharing from mutual funds violated § 1106(b)(3). In the first, the party seeking advice was a company called ALIAC, which provided recordkeeping services for pension plans that received 12b-1 fees from the mutual funds that ALIAC made available to the plan participants for investment. *See* DOL Advisory Opinion 97-16A (May 22, 1997). ALIAC represented that the plan fiduciaries were completely independent from ALIAC, and that the plan fiduciaries made the ultimate decisions regarding what mutual funds would be made available to the plan participants. *Id.* The Secretary noted that the first question that must be answered is whether ALIAC was a fiduciary. *Id.* The Secretary said that "whether a person is a fiduciary with respect to a plan requires an analysis of the types of functions performed and the actions taken by the person on behalf of the plan to determine whether particular functions or actions are fiduciary in nature and therefore subject to ERISA's fiduciary responsibility provisions." *Id.* As a result, whether a person is a "fiduciary" is "inherently factual and will depend on

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[7] Advisory Opinions from the DOL are not binding on the Court. *See Patelco*, 262 F.3d at 908 (citing ERISA treatise which states that "[o]nly the parties described in the request for opinion may rely on the opinion"). Nonetheless, the Court finds the DOL Advisory Opinions helpful to understand the scope of § 1106(b)(3).

the particular actions or functions ALIAC performs on behalf of the Plans." *Id.* The Secretary opined that ALIAC would not be a fiduciary with respect to the selection of the mutual funds "provided that the appropriate plan fiduciary in fact makes the decision to accept or reject the change." *Id.*

In another Advisory Opinion, the Secretary opined that a similar arrangement did not violate § 1106(b)(3). *See* DOL Advisory Opinion 97-15A (May 22, 1997). The party requesting advice was a trustee company named Frost, which provided various administrative services to pension plan clients. *Id.* Frost had also entered into arrangements with mutual funds whereby Frost made the mutual funds available to the plans, and, in return, received 12b-1 fees. *Id.* The Secretary said that so long as the trustee "does not exercise any authority or control to cause a plan to invest in a mutual fund, the mere receipt by the trustee of a fee or other compensation from a mutual fund in connection with such investment would not in and of itself violate section 406(b)(3)." *Id.* However, because Frost had some ability to add or remove mutual funds from the plan lineup, the Secretary was unable to conclude that it "would not exercise any discretionary authority or control to cause the Plans to invest in mutual funds that pay a fee or other compensation to Frost." *Id.* Nonetheless, because Frost's trustee agreements were structured so that the 12b-1 fees were used to offset the costs that the plans would be obligated to pay for Frost's services, the Secretary opined that Frost was not

receiving payments for its own personal account in violation of § 1106(b)(3). *Id.*

Finally, in a 2003 Advisory Opinion, the Secretary again addressed whether a trust company violated § 1106(b)(3) by offering bundled services which included certain mutual funds. *See* DOL Advisory Opinion 2003-09A (June 25, 2003). The trust company involved was called AATSC that provided "bundled service" arrangement to its clients, which included trustee service, recordkeeping, tax compliance, and participant communications. *Id.* AATSC stated that it made certain mutual funds available to the plan participants and that those mutual funds then paid AATSC a portion of the 12b-1 fees that were generated from the plan participants' investments in those funds. *Id.* Consistent with its earlier opinions, the Secretary wrote that AATSC's receipt of 12b-1 fees from the mutual funds would not violate § 1106(b)(3) "when the decision to invest in such funds is made by a fiduciary who is independent of AATSC and its affiliates, or by participants of such employee benefit plans." *Id.*

All three Advisory Opinions suggest that SCE should not be liable merely for receiving some benefit from revenue sharing from the mutual funds, because Plaintiffs have not presented evidence that SCE made the decisions to invest in those mutual funds. These Advisory Opinions emphasize that it is permissible for an entity to receive some compensation in the form of revenue sharing so long as that entity is not the one deciding whether to add or delete certain

mutual funds. Here, the evidence reveals that the decisions to invest in the mutual funds were made by fiduciaries other than SCE. Thus, SCE cannot be liable for violating § 1106(b)(3).[8]

The fact that a fiduciary must be involved in the transaction in order to be liable under § 1106(b)(3) stems from the fundamental question here, which is whether SCE is in fact a fiduciary with respect to the transactions that generated the revenue sharing. As courts have repeatedly recognized, just because a person is a fiduciary in one respect, does not mean that the person is a fiduciary in all respects. *See Acosta v. Pacific Enters.*, 950 F.2d 611, 618 (9th Cir. 1991) ("[A] person's actions, not the official designation of his role, determine whether he enjoys fiduciary status."). ERISA "does not make a person who is a fiduciary for one purpose a fiduciary for every purpose." *Johnson v. Georgia-Pacific Corp.*, 19 F.3d 1184, 1188 (7th Cir. 1994). The statute provides:

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[8] This interpretation of § 1106(b)(3) is also consistent with *Haddock v. Nationwide Financial Services Inc.*, 419 F. Supp. 2d 156 (D. Conn. 2006). The allegation in *Haddock* was that "Nationwide receives payments from mutual funds in exchange for offering the funds as an investment option to the Plans and participants, i.e., as a result of its fiduciary status or function." *Id.* at 170. Thus, it was clear in that case that the fiduciary who was alleged to have received the revenue sharing payments from the mutual funds had control over which mutual funds were included among the options to the plan participants.

> [A] person is a fiduciary with respect to a plan *to the extent* (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan.

29 U.S.C. § 1103(21)(A) (emphasis added). The key part of this statutory provision is the phrase "to the extent." The inclusion of this phrase "means that a party is a fiduciary only as to the activities which bring the person within the definition." *Coleman v. Nationwide Life Ins. Co.*, 969 F.2d 54, 61 (4th Cir. 1992). "The statutory language plainly indicates that the fiduciary function is not an indivisible one. In other words, a court must ask whether a person is a fiduciary with respect to the particular activity at issue." *Id.*; *see also Landry v. Airline Pilots Ass'n Int'l AFL-CIO*, 901 F.2d 404, 418 (5th Cir. 1990) ("[F]iduciary status is to be determined by looking at the actual authority or power demonstrated, as well as the formal title and duties of the party at issue.").

Here, Plaintiffs have not presented evidence that SCE had control over the decisions that resulted in the generation of the revenue sharing. Instead, the evidence presented by the Plaintiffs shows that

different fiduciaries, the TIC or Benefits Committee, conducted the transactions in question. Plaintiffs have not pointed to evidence showing that these committees were somehow controlled by SCE. In fact, the evidence shows that the TIC and Benefits Committee were separate entities who performed their fiduciary function independently from SCE. (*See* Decker Decl., Exs. M & DD.) Without the necessary control, SCE cannot be a fiduciary with respect to those decisions, and therefore, cannot be liable for simply receiving the consideration from those transactions.

Plaintiffs mention that the individual members of the TIC and Benefits Committee are appointed by the SCE CEO. However, merely appointing individuals to be members of the Committees is insufficient evidence to show that SCE exercised the requisite control over specific transactions involved in the alleged prohibited transactions.

For example, in *Kanawi v. Bechtel Corp.*, 590 F. Supp. 2d 1213 (N.D. Cal. 2008), the analogous company to SCE here, Bechtel, argued that it was not a fiduciary with respect to the specific investment decisions that were made on behalf of the plan. *Id.* at 1224. The court noted that "[f]iduciaries can be held liable only for claims arising out of the exercise of their fiduciary duties." *Id.* (citing *Gelardi v. Pertec Computer Corp.*, 761 F.2d 1323, 1325 (9th Cir. 1985)). The court found no evidence that Bechtel had placed people on the investment committee who would serve Bechtel's interest. *Id.* "Furthermore, the evidence

does not suggest that Bechtel *itself* exercised power over the investment decisions related to the Plan." *Id.* (emphasis added). Thus, the court found that Bechtel could only be liable on a theory of co-fiduciary liability under § 1105(a).[9]

Much like *Kanawi*, here, there is no evidence that SCE placed people on the Benefits Committee or TIC in order to serve SCE's interests. Nor is there evidence that SCE itself exercised power over the investment decisions. In light of the absence of evidence that SCE had any control over the transactions that generated the revenue sharing, SCE cannot be liable for violating § 1106(b)(3). Plaintiffs' motion for summary judgment on this claim is therefore denied.

The Court will also enter judgment in favor of Defendants on this claim because the undisputed evidence shows that the transactions in question were executed by the Benefits Committee or the TIC, yet neither received consideration as a result of those transactions. As discussed *infra*, while there may be some ambiguity with regard to the role that the Investments Staff played in the decisions of which mutual funds to add as options in the Plan, Plaintiffs have not sustained their burden of producing evidence

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[9] Plaintiffs also cite to the unpublished case *Chao v. Linder*, 2007 WL 1655254 (N.D. Ill. 2007). Even in that case, however, the defendants were alleged to have violated § 1106(b)(3) by receiving motorcycles "because of their actions, decisions and other duties relating to the questions and matters concerning their respective plans." *Id.* at *5.

that the actions of the Investments Staff can be attributed to SCE generally. Furthermore, even if the Investments Staff had significant control over those decisions, Plaintiffs have identified no evidence that the Investments Staff, either collectively or individually, received consideration in exchange for the decisions they made. Without some evidence that the relevant fiduciaries received consideration for decisions made with respect to the Plan, there can be no violation of § 1106(b)(3). Thus, summary judgment will be granted for Defendants on this claim.

As an independent basis, Plaintiffs' claim for violation of § 1106(b)(3) is barred, at least in part, by the statute of limitations. To some extent, Plaintiffs' claim is premised on the contracts between the Plan and the mutual funds, which were entered into before August 16, 2001. (*See* Pl.'s Exs. N & P.) By contrast, however, some of the transactions whereby the mutual funds were selected for inclusion in the Plan occurred after August 16, 2001. Thus, to the extent that these transactions occurred before August 16, 2001, Plaintiffs' claim [sic] are barred by the statute of limitations.

2. § 1106(b)(2)

Plaintiffs move for summary judgment on the basis that SCE's arrangement with Hewitt was a prohibited transaction pursuant to § 1106(b)(2). This section states that a fiduciary shall not "act in any transaction involving the plan on behalf of a party (or

represent a party) whose interests are adverse to the interests of the plan or the interests of its participants or beneficiaries." *Id.*

Specifically with regard to this allegation, Plaintiffs contend that the TIC, a named Plan fiduciary, was also acting on behalf of SCE when deciding which mutual funds to include among the menu of options for the Plan. Plaintiffs argue that SCE's interests were directly adverse to the Plan's interests because the amount of money that SCE was obligated to pay for Hewitt's recordkeeping service depended on how much revenue sharing was received from the mutual funds. Under the language of the statute therefore, Plaintiffs' theory is that the TIC ("a fiduciary") was choosing mutual funds that generated revenue sharing for inclusion in the investment menu ("act[ing] in any transaction involving the plan") for the benefit of the parent corporation SCE ("on behalf of a party (or represent a party)") who stood to benefit from the revenue sharing that originally came from the assets of the plan ("whose interests are adverse to the interests of the plan").

The operative transactions that Plaintiffs identify are the decisions whereby the TIC selected the mutual funds for inclusion as an investment option for the Plan participants. These transactions involved the TIC (on behalf of the Plan) on one side, and the mutual funds on the other side of the transaction. However, there is no allegation that the TIC represented the mutual funds in those transactions; that is, there is no allegation that the fiduciary was acting

on both sides of the transaction. In fact, the adverse party which the TIC was alleged to have represented – SCE – was not involved in those transactions at all. Rather, Plaintiffs' theory appears to be that although the TIC was acting in the transactions with the mutual funds purportedly on the Plan's behalf, in reality (and secretly), the TIC was acting on behalf of SCE. This, however, is not a prohibited transaction under § 1106(b)(2), but more accurately characterized as a claim for breach of the duty of loyalty under § 1104(a)(1)(A).

Section 1106(b)(2) is commonly understood to "prohibit[ ] a fiduciary from engaging in a self-dealing transaction." *Wilson v. Perry*, 470 F. Supp. 2d 610, 623 (E.D. Va. 2007). Indeed, in each of the cases Plaintiffs cite where a violation of § 1106(b)(2) was found, the defendant fiduciary was acting on behalf of a party standing on the other side of the transaction. In *Donovan v. Mazzola*, 716 F.2d 1226 (9th Cir. 1983), for example, there were two funds, the Convalescent Fund and the Pension Fund, both of which shared the same trustees. *Id.* at 1237. The plaintiffs alleged that the trustees had engaged in a prohibited transaction under § 1106(b)(2) by making loans between the two funds. *Id.* The Ninth Circuit found a violation of § 1106(b)(2) because "'[f]iduciaries acting on both sides of a loan transaction cannot negotiate the best terms for either plan. Each plan must be represented by trustees who are free to exert the maximum economic power manifested by their fund whenever they are negotiating a commercial transaction.'" *Id.*

at 1238 (quoting *Cutaiar v. Marshall*, 590 F.2d 523 (3rd Cir. 1979)).

Similarly, in *Freund v. Marshall & Ilsley Bank*, 485 F. Supp. 629 (W.D. Wis. 1979), the court found that fiduciaries for the plan had engaged in a prohibited transaction by loaning money from the plan to the sponsoring companies, where the fiduciaries were members of the top management of the sponsoring companies. *Id.* at 638. The court said that "because the interests of a lender and a borrower are, by definition, adverse, a fiduciary cannot act in a loan transaction on behalf of a party borrowing from the plan without violating § [1106(b)(2)]." *Id.* at 637-38. In making the loans from the pension plan to the companies, the plan documents required the trustees to approve the transaction, resulting in the trustees acting on behalf of the plan in the transaction. *Id.* at 638. Furthermore, the evidence showed that certain trustees were also members of the top management of the sponsor companies, and those trustees had been involved in the approval process for the transaction on behalf of the companies. *Id.* Thus, the court found that the trustees had "in effect, represented both sides of the transaction," and therefore violated § 1106(b)(2). *Id.*

In *Parker v. Bain*, 68 F.3d 1131 (9th Cir. 1995), the court found that Parker, the vice president of the sponsoring company Pac Ship, was a fiduciary of the company pension plan because he exercised "discretionary authority" over plan assets. *Id.* at 1139. During a period of financial difficulty for Pac Ship,

Parker transferred money from the funds of the pension plan to the company's general account. *Id.* at 1140. The court found a prohibited transaction in violation of § 1106(b)(2) because "[i]n transferring those funds into Pac Ship's account, Parker acted on behalf of Pac Ship in a transaction in which Pac Ship's interests were clearly adverse to the interests of the Plan." *Id.*

Unlike these cases, here, Plaintiffs do not allege that the TIC stood on both sides of the transaction by representing the mutual funds in connection with the transactions whereby the mutual funds became investment options for the Plan participants. Instead, Plaintiffs allege that TIC represented SCE – yet SCE was not engaged in any of the transactions between the Plan and the mutual funds. Although SCE may have had an interest adverse to the Plan in connection with those transactions,[10] SCE was not a party to those transactions.

In *Donovan v. Bierwirth*, 680 F.2d 263 (2d Cir. 1982), the Second Circuit declined to apply

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[10] "An 'adverse party' is one whose interests conflict with those of the plan and its members." *Donovan v. Walton*, 609 F. Supp. 1221, 1246 (S.D. Fla. 1985). "[T]he interests need not directly conflict but must be sufficiently different." *Int'l Bhd. of Painters & Allied Trades Union & Indus. Pension Fund v. Duval*, 925 F. Supp. 815, 825 (D.D.C. 1996). Here, the interests of SCE could have conflicted with the interests of the plan Participants, if SCE had an interest in choosing mutual funds that offered revenue sharing, if those mutual funds were of poorer quality than others available in the market.

§ 1106(b)(2) in a case similar to ours. There, a company made a tender offer in an attempt to buy out the plan sponsor, a company named Grumman. *Id.* at 266. The plan trustees voted not to tender the plan's Grumman shares and, in fact, even decided to purchase more Grumman stock in the face of the tender offer. *Id.* at 268-69. The plaintiffs alleged that the trustees of the Grumman pension plan had engaged in a § 1106(b)(2) prohibited transaction in connection with these decisions because the trustees had acted on Grumman's behalf in an effort to defeat the tender offer in connection with the additional purchase of stock. *Id.* at 270. The Second Circuit found § 1106(b)(2) inapplicable, however, stating that "[w]e read this section of the statute as requiring a transaction between the plan and a party having an adverse interest." *Id.* Thus, presumably, since the transactions at issue – the purchase of stock – were between the plan and an individual stockholder, not the plan and Grumman, whom the trustees were alleged to have been representing, there was no § 1106(b)(2) violation. *See id.* The court further noted that the cases cited by the plaintiff involved "self-dealing clearly prohibited" by the statute. *Id.* Thus, the court declined to extend § 1106(b)(2) to the facts of the case "particularly in light of the inclusion of the sweeping requirements of prudence and loyalty contained in [§ 1104]." *Id.*

Similarly, here, the transactions at issue do not involve a transaction between the Plan and SCE, on who's behalf the TIC is alleged to have been acting.

Thus, § 1106(b)(2) does not apply. As recognized by the Second Circuit in *Bierwirth*, Plaintiffs' claim is one for breach of the duty of loyalty under § 1104(a)(1)(A), but is not a per se prohibited transaction. As discussed *infra*, to the extent there is evidence to suggest that the TIC chose mutual funds depending on the amount of revenue sharing that they offered, Plaintiffs may have a claim for breaching their duty of loyalty by not acting exclusively in the interests of the Plan participants.

Plaintiffs' § 1106(b)(2) claim fails for an additional reason as well. As part of their claim, Plaintiffs would have to prove that the TIC acted "on behalf of" or "represented" SCE in connection with the mutual fund transactions. *See id.* In each of the cases applying § 1106(b)(2), the required relationship between the fiduciary and the adverse party has been more than a secret loyalty to the adverse party, but rather, has consisted of a formal employer-employee or agency-type relationship. In *Mazzola*, the fiduciaries were also trustees of a different pension plan, 716 F.2d at 1237; in *Freund*, the fiduciaries were upper-level managers at the adverse company, 485 F. Supp. at 638; and in *Parker*, the fiduciary was the vice president of the adverse company, 68 F.3d at 1139. Each of these fiduciaries held an official position with the adverse party, which allowed each court to find that the fiduciary was acting "on behalf of" or "representing" the adverse party. Here, however, Plaintiffs have identified no evidence that the TIC had a similar formal role with SCE. Plaintiffs mention that

some of the members of the TIC were appointed by SCE's CEO, but Plaintiffs do not point to evidence that would support a formal relationship similar to those present in the cases cited above.

Furthermore, even in those cases where the fiduciary held an official position in an adverse party, the plaintiff was required to prove that the fiduciary was actually acting on behalf of the adverse party in connection with that transaction. For example, in *Reich v. Compton*, 57 F.3d 270 (3rd Cir. 1995), the Third Circuit remanded the case to the district court to determine whether certain plan fiduciaries who also had positions in the adverse parties to a loan transaction "acted on behalf of or represented" the adverse parties in connection with that transaction. *Id.* at 290. The court noted that the fiduciaries could have acted on behalf of the adverse parties because the fiduciaries were also officers in the adverse parties, they did not recuse themselves when the transaction was being considered by the adverse parties, and they actually participated in the discussions among officers of the adverse parties with respect to the transactions. *Id.* The court suggested that these facts in themselves may have actually been sufficient to justify summary judgment for the plaintiffs, but remanded to the district court to determine whether, during the adverse parties' deliberations concerning the transactions, the "trustees took any action" in their capacities as officers for the adverse parties. *Id.* "If they did, then they took actions in this transaction on behalf of parties with interests adverse to the

Plan, and they therefore violated section [1106(b)(2)]." *Id.*

Here, Plaintiffs have not produced sufficient evidence that the TIC actually acted on SCE's behalf in selecting the mutual funds. Plaintiffs point to no evidence, for example, that the members of the TIC were also officers of SCE, or that they played any role on behalf of SCE in connection with the mutual fund selection process. Thus, for this separate reason, Plaintiffs' [sic] are not entitled to summary judgment on this claim.

The plaintiff in *Compton* advanced a theory that is nearly identical to the theory advance [sic] by Plaintiffs' [sic] in this case. The court noted that the plaintiff argued that the trustees had violated § 1106(b)(2) because, "while acting in their capacities as plan trustees during the consideration of the [transaction], they were actually serving the interests of the [adverse parties]." *Id.* at 290 n.29. In essence, the plaintiff in *Compton* argued the exact same "secret loyalty" theory that Plaintiffs advance here – that even though the fiduciaries were purportedly acting on behalf of the Plan when selecting the mutual funds for inclusion as investment options, in reality they were acting on behalf of a party with an adverse interest. The Third Circuit noted that "[t]his theory, although based on section [1106(b)(2)], seems to resemble the [plaintiff's] claim against all the trustees under section [1104(a)(1)(A)]," for breach of the duty of loyalty. *Id.* Thus, the court declined to address

such a theory within the context of the § 1106(b)(2) framework. *Id.*

Similarly, here, as the Third Circuit noted in *Compton*, while Plaintiffs' theory based on a secret loyalty to SCE in connection with the selection of the mutual funds could be considered a claim for breach of the duty of loyalty under § 1104(a)(1)(A), such a theory does not form the basis for a per se prohibited transaction. Thus, the Court finds Plaintiffs' § 1106(b)(2) theory inapplicable as a matter of law and grants summary judgment for Defendants on this claim.[11]

E. Violation of the Plan Document – § 1104(a)(1)(D)

Plaintiffs move for summary judgment on the basis that SCE violated the terms of the Plan by failing to pay the full extent of Hewitt's recordkeeping costs, and instead, allowed revenue sharing to be used to offset the costs of Hewitt's recordkeeping service. The statute requires a fiduciary to "discharge his duties with respect to a plan in accordance

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[11] In light of the Court's conclusion that Defendants are entitled to summary judgment for violation of § 1106(b)(2) and (b)(3), the Court need not resolve Defendants' argument that the safe harbor provision of § 1108(c)(2) applies. The Court notes, however, that § 1108(c)(2) appears not to apply to such violations in light of the Ninth Circuit's decision in *Patelco Credit Union v. Sahni*, 262 F.3d 897, 911 (9th Cir. 2001) ("§ 1108(c)(2) does not provide a safe harbor to fiduciaries who self-deal.").

with the documents and instruments governing the plan." 29 U.S.C. § 1104(a)(1)(D).

Before addressing the merits of Plaintiffs' claim, a brief recap of the relevant facts may be helpful. The Master Plan document provided that "[t]he cost of the administration of the Plan will be paid by [SCE]." (Decker Decl., Ex. GG, at 48.) Plaintiffs contend, however, that SCE did not pay the costs of administering the Plan because some of Hewitt's recordkeeping costs were offset with fees that Hewitt received directly from certain mutual funds. When retail mutual funds were added to the Plan in 1999, Hewitt already had preexisting contractual relationships with certain retail mutual funds whereby, if one of Hewitt's pension plan clients invested in those mutual funds, then Hewitt would receive a proportion of the revenue sharing that was generated as a result of those investments. To the extent that Hewitt received revenue sharing as a result of the Plan investing in those retail mutual funds, Hewitt used at least 80% of those fees to offset the amount that SCE owed Hewitt for Hewitt's recordkeeping services. Hewitt did not have revenue sharing arrangements with all retail mutual funds however, and as a result, contractual arrangements were made whereby the revenue sharing that was generated as a result of Plan assets being invested in those mutual funds was to be passed along to Hewitt, and used to offset the amount that SCE owed Hewitt for Hewitt's recordkeeping service.

One important fact, however, is that the amount of fees actually charged to the Plan participants in connection with their investment in the retail mutual funds was not connected to the proportion of the revenue sharing that was paid to Hewitt. Rather, the mutual funds charged individual investors a fee, which was characterized as the overall expense ratio for the mutual fund. The expense ratio was charged to all investors that invested in the mutual fund and was deducted before any returns were actually paid to the investor. As a result, even if Hewitt had not received any portion of the fees from the mutual funds, the individual Plan participant would have been charged the same fee for investing with that mutual fund. If a portion of that fee had not gone to Hewitt for its recordkeeping services, then presumably it would have gone somewhere else, but there is no indication that the mutual funds would have refunded the fee back to the Plan participants. The result therefore is that even though SCE may not have paid the full cost of Hewitt's services due to the offsets from revenue sharing, even if SCE had paid the full amount of Hewitt's recordkeeping services before the revenue sharing offsets, the Plan participants would not have realized any savings.

In light of this factual summary, the Court must decide whether Defendants violated the Plan documents by using revenue sharing from the mutual funds to offset Hewitt's recordkeeping costs. At first blush, it seems somewhat peculiar that Plaintiffs would be able to bring this claim given that the Plan

has suffered no economic loss simply because revenue sharing was used to pay for the cost of Hewitt's recordkeeping service. Courts, however, have allowed plaintiffs to bring suits for violation of the plan documents by a fiduciary even in the absence of damage to the plan. In *LaScala v. Scrufari*, 479 F.3d 213 (2d Cir. 2007), the Second Circuit reversed the district court's decision that there could be no § 1104(a)(1)(D) violation because the plan suffered no loss. *Id.* at 221. The defendant fiduciary had violated the terms of the plan by giving his son a raise without the proper approval from the other plan trustees. *Id.* The court said that "[t]he fact that the Funds may not have suffered any loss as a result of Russell's salary increases may bear on the question of damages, but has no bearing on whether [the defendant] breached his fiduciary duties in the first place." *Id.* Thus, the court held that a claim for violation of § 1104(a)(1)(D) can be brought even in the absence of a loss to the plan.

Furthermore, the statute provides that injunctive relief may be an appropriate remedy for such a breach of fiduciary duty. 29 U.S.C. § 1109(a) provides that "[a]ny person who is a fiduciary with respect to the plan who breaches any of the responsibilities, obligations, or duties imposed by this subchapter shall be subject to *such other equitable or remedial relief* as the court may deem appropriate, including removal of such fiduciary." *Id.* (emphasis added). Similarly, § 1132(a)(3) allows a participant to bring an action "to enjoin any act or practice which violates

any provision of this subchapter or the terms of the plan, or to obtain other appropriate equitable relief (i) to redress such violations or (ii) to *enforce any terms of the plan.*" *Id.* (emphasis added). These provisions contemplate that declaratory or injunctive relief may be appropriate even in the absence of any economic loss to the plan.

Indeed, the Ninth Circuit has rejected the argument that there must be a loss to the plan in order to bring an action for breach of fiduciary duty seeking injunctive relief. *See Shaver v. Operating Eng'r Local 428 Pension Trust Fund*, 332 F.3d 1198, 1203 (9th Cir. 2003). In *Shaver*, the Ninth Circuit noted that some courts have required the plaintiff to show a loss to the plan. *Id.* The Ninth Circuit, however, limited the loss requirement to cases where the plaintiff was seeking monetary relief. *Id.* (citing *Friend v. Sanwa Bank of California*, 35 F.3d 466, 469 (9th Cir. 1994)). The court noted that the plaintiff was seeking injunctive relief in the form of enjoining future misconduct or having the trustees removed. *Id.* The court concluded:

> Requiring a showing of loss in such a case would be to say that the fiduciaries are free to ignore their duties so long as they do no tangible harm, and that the beneficiaries are powerless to rein in the fiduciaries' imprudent behavior until some actual damage has been done. This result is not supported by the language of ERISA, the common law, or common sense.

Id.

Here, Plaintiffs seek injunctive relief for the alleged violations of the Plan documents. Thus, in light of *Shaver*, the Court finds that Plaintiffs are not barred from pursuing their claim for breach of the Plan documents even in the absence of some loss to the Plan.

A fiduciary's failure to discharge its duties in accordance with the plan documents is an independent basis for finding a breach of fiduciary duty under § 1104(a)(1). *See Dardaganis v. Grace Capital Inc.*, 889 F.2d 1237, 1241 (2d Cir. 1989). Indeed, "[a] fiduciary's failure to meet the[ ] specific requirements of section 1104(a)(1) is not merely evidence of imprudent action but may, in itself, be a basis for liability under section 1109." *Id.*

Although a fiduciary has an obligation to act in accordance with the terms of the plan document, ERISA "does not require that a fiduciary resolve every issue of interpretation in favor of the plan beneficiaries." *O'Neil v. Ret. Plan for Salaried Employees of RKO Gen., Inc.*, 37 F.3d 55, 61 (2d Cir. 1994); *see also Wright v. Oregon Metallurgical Corp.*, 360 F.3d 1090, 1100 (9th Cir. 2004) (quoting *O'Neil*); *Collins*, 144 F.3d at 1282 (same). In fact, when a plan explicitly grants a fiduciary the authority to interpret the language of the plan, the fiduciary's interpretation is entitled to deference. *See O'Neil*, 37 F.3d at 61.

In *O'Neil*, the plan "explicitly granted the [fiduciary] the authority to interpret the plan terms." *Id.* at 59. As a result, the court applied an "arbitrary and

capricious standard" of review. *Id.* Other courts have similarly applied a deferential standard of review to a fiduciary's interpretation of the plan documents under § 1104(a)(1)(D) when the Plan explicitly provides for such discretion. *See, e.g.*, *Hunter v. Caliber Sys., Inc.*, 220 F.3d 702, 711-12 (6th Cir. 2000) (applying the arbitrary and capricious standard to breach of fiduciary duty claims); *Moench v. Robertson*, 62 F.3d 553, 565 (3rd Cir. 1995) ("[W]e believe that after *Firestone*, trust law should guide the standard of review over claims, such as those here, filed pursuant to 29 U.S.C. § 1132(a)(2) based on violations of the fiduciary duties set forth in section 1104(a)."); *but see In re Gulf Pension Litig.*, 764 F. Supp. 1149, 1206 (S.D. Tex. 1991) ("When a plaintiff sues to enforce an express statutory fiduciary duty under § 406(a)(1)(D) and to challenge acts of the employer, as a fiduciary, that advance the employer's own economic interest, the abuse of discretion standard does not apply.") (citing *Struble v. New Jersey Brewery Employees' Welfare Trust Fund*, 732 F.2d 325, 333 (3rd Cir. 1984)).

Even in the absence of express discretionary language, courts have not applied a standard of strict liability such that any technical violation of the plan constitutes a per se violation of § 1104(a)(1)(D). *See LaScala*, 479 F.3d at 221. In *LaScala*, the court found that the defendant had breached his fiduciary duty by failing to comply with the terms of the plan documents because "[a] prudent person in Scrufari's position, bound by the highest duty known to law,

would have known that he could not raise his compensation without a majority vote of the trustees." *Id.* This language from *LaScala* reveals that in order to be liable for a violation under § 1104(a)(1)(D), the plan document must put a reasonable fiduciary on notice that the conduct in question is prohibited. It makes sense for some inquiry to be made as to the reasonableness of the fiduciary's interpretation of the plan before a fiduciary can be held liable for breaching his fiduciary duties pursuant to § 1104(a)(1)(D). Section 1104(a) by its very nature outlines standards of fiduciary conduct that are not necessarily per se violations – per se violations are found at § 1106.

Here, beginning on November 29, 2001, the Master Plan document gave the Benefits Committee "full discretion to construe and interpret the terms and provisions of this Plan, which interpretation and construction shall be final and binding on all parties, including but not limited to the Company and any Participant or Beneficiary." (Decker Decl., Ex. AA, at 31.) This language from the Master Plan document is of obvious importance because it unambiguously gives the Benefits Committee discretion to interpret the language of the Plan. Thus, any such interpretations are subject to a more deferential standard of review.

The threshold question in the analysis is whether there is any ambiguity in the Plan documents with respect to whether revenue sharing could be used to defray the costs of Hewitt's recordkeeping service. *See O'Neil*, 37 F.3d at 58. Indeed, summary judgment

may be appropriate if the Plan documents unambiguously proscribe certain conduct, yet the fiduciary pursues such conduct. *See Dardaganis*, 889 F.2d at 1241. Even under a deferential standard of review, it is an abuse of discretion to interpret the language of plan in a way that conflicts with its unambiguous plain language. *See Boyd v. Bert Bell/Pete Rozelle NFL Players Retirement Plan*, 410 F.3d 1173, 1178 (9th Cir. 2005) ("An ERISA administrator abuses its discretion only if it (1) renders a decision without explanation, (2) *construes provisions of the plan in a way that conflicts with the plain language of the plan*, or (3) relies on clearly erroneous findings of fact." (emphasis added)).

Summary judgment for the plaintiff, however, is only appropriate in cases where the plan documents make it clear that the conduct in question is unambiguously prohibited. *See O'Neil*, 37 F.3d at 58. For example, in *O'Neil*, the plaintiffs argued that the fiduciary had violated the plan document by failing to classify certain "SICP payments" as "earnings" within the meaning of the plan document. *Id.* The court said that "[s]ummary judgment would have been proper *only if* the [Plan] unambiguously included SICP payments as 'Earnings.'" *Id.* (emphasis added). Looking to the four corners of the plan alone, the court noted that the "core definition" of "earnings" was the regular salary paid to a participant during the calendar year. *Id.* However, the SICP payments had deferred vesting periods and contingent valuations, which the court found made it "not clear that

such payments were regular salary." *Id.* Furthermore, the court noted that certain terms were capitalized, which implied that they were defined terms. *Id.*

Applying the reasoning from *O'Neil* here, summary judgment would be properly granted in Plaintiffs' favor only if the Plan documents unambiguously prohibited the use of revenue sharing from the mutual funds to offset Hewitt's recordkeeping costs. The operative language from the Master Plan document states that "[t]he cost of administration of the Plan will be paid by the Company." (*See* Decker Decl., Ex. GG, at 48.) The Plan document does not define the term "cost." Presumably, however, Hewitt's services as the Plan recordkeeper would be considered part of the "cost of administration of the Plan." Even so, there is nothing in the Master Plan document that prohibits Hewitt's recordkeeping services from being paid by a third party such as the mutual funds. Plaintiffs have not identified any specific language from the Master Plan document that would have put members of the Benefits Committee on notice that the use of revenue sharing from the mutual funds to offset the costs of Hewitt's recordkeeping was prohibited. Thus, in the absence of any unambiguous language prohibiting such an arrangement, the Court finds that Plaintiffs are not entitled to summary judgment for breach of the Plan document.

In the absence of a breach of an unambiguous plan provision, it is necessary to go beyond the four corners of the Plan document and evaluate the interpretation given to the Plan by Defendants. As noted

above, beginning in November 29, 2001, the Plan documents gave the Benefits Committee "full discretion to construe and interpret the terms and provisions of this Plan." In light of this language, the Benefits Committee's interpretation from November 29, 2001 forward should be reviewed under an abuse of discretion standard. *See O'Neil*, 37 F.3d at 59.

There is a brief period of time, however, just before the Plan was restated in November 29, 2001, where there does not appear to have been any such express discretionary language in the Plan. The statute of limitations began on August 16, 2001. This period of time, therefore, amounts to only about three and half months. Nevertheless, during this time, there was no express discretion given to Defendants to interpret the Plan.

Without the discretionary language, the Benefits Committee's interpretation should be reviewed under a de novo standard of review. *See O'Neil*, 37 F.3d at 59. Under such review, the Court must render its own independent judgment as to whether Defendants' interpretation of the Plan was correct. *See Padfield v. AIG Life Ins. Co.*, 290 F.3d 1121, 1125 (9th Cir. 2002). Because the Plan does not expressly prohibit the conduct in question, the Court may consider extrinsic evidence and determine the intent of the parties. *See O'Neil*, 37 F.3d at 61. Specifically, the question here is whether Defendants were correct to interpret the Plan to allow the use of the revenue sharing from the mutual funds to offset Hewitt's recordkeeping costs.

Applying a de novo standard of review, the Court finds that Defendants were correct to interpret the Plan as allowing the use of revenue sharing to offset Hewitt's recordkeeping costs. First, the undisputed facts show that during the course of the collective bargaining with the unions in 1998 and 1999, there were extensive discussions with regard to how revenue sharing from the mutual funds would be used to offset the costs of Hewitt's recordkeeping services. (SUF ¶ 38.) The undisputed evidence shows that Ms. Decker personally walked the union representatives through the process by which the revenue sharing was generated, and how the revenue sharing from the mutual funds would be used to pay for Hewitt's recordkeeping services. (*Id.*) The union representatives had no objection to this arrangement. (*Id.* ¶ 39.) Thus, not only did the Plan not prohibit the use of revenue sharing to pay for Hewitt's services, but in fact, Defendants had a reasonable belief that the Plan participant consented to the use of revenue sharing to pay for Hewitt's services.

Second, between 1999 and 2006, Defendants informed the Plan participants at least seventeen times either through Summary Plan Descriptions or other benefits brochures that fees from the mutual funds were being used to reduce Hewitt's recordkeeping costs. (*Id.* ¶ 32.) One such SPD states: "Mutual funds pay fees to recordkeepers that provide the above administrative services to 401(k) plan participants. Most of the fees received by Edison's 401(k) plan recordkeeper are used to reduce the recordkeeping

and communication expenses of the plan paid by the company." (Decker Decl., Ex. A, at 50). Defendants received no objection to this arrangement despite the numerous disclosures.

Finally, the accuracy of the Benefits Committee's interpretation is further bolstered by the fact that the use of revenue sharing to offset Hewitt's recordkeeping costs did not directly harm the Plan participants. The mutual funds charged the Plan participants the standard expense ratio for investing in the retail mutual funds; this expense ratio was charged to all investors (SCE employees or otherwise) in the mutual funds. If the revenue sharing that was generated as a result had not been used to pay Hewitt's recordkeeping costs, there is no indication that those fees would have been returned to the Plan participants. In light of the fact that the Plan participants would have been charged the same fee regardless, Defendants were correct to interpret the Plan to allow those fees to be used to pay for the Plan's recordkeeping costs, even if such an arrangement did inure to SCE's benefit.

Plaintiffs may argue that such an interpretation did harm the Plan participants because it created a conflict of interest, whereby SCE had an interest in selecting mutual funds with higher revenue sharing, which could have motivated the Plan fiduciaries to choose poorer performing mutual funds for inclusion in the Plan. Such alleged harm, however, does not stem from the interpretation given to the Plan, but from the subsequent events of the fiduciaries. It was entirely possible for the Plan fiduciaries to operate

under such a conflict of interest without having ever taken action to harm the Plan. Indeed, it may in fact be the case that the Plan fiduciaries chose high quality mutual funds for inclusion in the Plan despite this potential conflict of interest. Thus, the Court rejects any argument that by simply giving the Plan an interpretation that created the *potential* for a fiduciary to make a conflicted decision, that the original interpretation of the Plan was incorrect.

Thus, when applying a de novo review to Defendants' interpretation of the Plan documents, the Court finds that the interpretation was correct and did not constitute a violation of § 1104(a)(1)(D). Summary judgment will be granted in favor of Defendants on this claim.[12]

Plaintiffs cite to the Ninth Circuit case *Bergt v. Retirement Plan for Pilots Employed by Markair, Inc.*, 293 F.3d 1139 (9th Cir. 2002), in support of their argument that the defendant fiduciaries failed to execute their duties in accordance with the Plan

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[12] Applying a more deferential standard of review, the Court would reach the same conclusion. Furthermore, even if the Court was somehow mistaken with respect to its de novo review of Defendants' interpretation, it is unlikely that significant damages would be at issue because there was no loss to the Plan. In addition, to the extent that the Court's decision would be upheld on an abuse of discretion review, the brief three and half month time period would not justify any significant equitable relief given that the Plan now contains the operative discretionary language and will presumably continue to do so going forward.

documents. In *Bergt*, the Ninth Circuit held that if a plan master document unambiguously qualifies an employee for benefits, but a summary plan document ("SPD") unambiguously disqualifies an employee for benefits, then the court does not consider extrinsic evidence to interpret the intent of the parties, but rather, the more favorable plan master document controls. *Id.* at 1146. *Bergt* was a benefits denial case brought under § 1132(a)(1)(B), not a breach of fiduciary duty case brought under § 1132(a)(2), and therefore, *Bergt* is distinguishable in an important way.

Nonetheless, even applying the rule from *Bergt* here, it would not change the analysis. By analogy to the fiduciary duty context, *Bergt* would hold that if the plan master document unambiguously prohibits a given course of conduct, and the SPD unambiguously allows a given course of conduct, then a fiduciary is required to pursue the course of conduct that is more favorable to the plan participants. Here, however, the plan master document does not unambiguously prohibit the use of revenue sharing from the mutual funds to offset Hewitt's recordkeeping costs. Thus, even on the assumption that *Bergt* applies in the fiduciary duty context, it would not alter the outcome in this case.

In sum, the Court finds that the Plan documents do not unambiguously prohibit revenue sharing from the mutual funds to be used to pay for Hewitt's recordkeeping costs. Furthermore, Defendants' interpretation of the Plan allowing such an arrangement was correct when applying a de novo standard of

review. Thus, Defendants' Motion for Summary Judgment is granted on this claim.

F. State Street Bank

Plaintiffs also bring a number claims for breach of fiduciary duty arising out of the fact that State Street retained interest, or "float," that was earned on cash before the cash was distributed to the Plan participants. SCE paid State Street a flat fee of $150,000 per year for its trustee services rendered to the Plan. State Street also retained the interest on the money it held pending distribution to the Plan participants. Plaintiffs alleged that, on average, cash was held in State Street's possession for twelve days before it was actually paid out to Plan participants, and as a result, State Street retained substantial sums of money through the float.

1. § 1104(a)(1)(D)

Plaintiffs contend that Defendants failed to discharge their duties in accordance with the Plan documents because Defendants allowed State Street to retain float as part of State Street's compensation. Section 1104(a)(1)(D) requires a fiduciary to "discharge his duties in accordance with the documents and instruments governing the plan." Plaintiffs contend that the Master Plan document, as discussed earlier, required SCE to pay the costs of administering the Plan, and that Defendants violated

the Plan documents by allowing some of State Street's compensation to be paid from float.

Plaintiffs' claim in this regard is similar to Plaintiffs' claim with regard to the use of revenue sharing from the mutual funds to offset costs of Hewitt's recordkeeping service. As a result, the analysis is quite similar, and the first question is whether there was anything in the Master Plan document that unambiguously prohibited Defendants from permitting State Street to retain float. *See O'Neil*, 37 F.3d at 58. Again, Plaintiffs point to the provision in the Master Plan document that says "[t]he cost of the administration of the Plan will be paid by [SCE]." (*See* Decker Decl., Ex. GG, at 48.) Again, the term "cost" is not a defined term in the contract, but State Street's trustee service would presumably be considered a "cost of the administration of the Plan." Nevertheless, Plaintiffs have not identified anything in the Master Plan document that unambiguously prohibits State Street from receiving float. Thus, the Court finds that Plaintiffs are not entitled to summary judgment on this claim.

Furthermore, the Court finds that any decision by Defendants decision to allow State Street to retain float was an accurate interpretation of the Plan under a de novo standard of review. Much like the revenue sharing from the mutual funds, the fact that State Street retained the float did not necessarily inure to the detriment of the Plan participants; State Street simply earned interest on the cash it held until the Plan participant cashed its check. Plaintiffs have

presented no evidence that State Street unreasonably delayed issuing the checks so that it could further capitalize on the float. Furthermore, Plaintiffs have not identified any evidence that State Street's retention of float was inconsistent with the accepted practice in the industry at the time. Thus, in light of the fact that there is no evidence of loss to the Plan participants, any decision by Defendants to allow State Street to retain float was not a violation of the Plan documents.[13]

2. § 1106(a)(1)(D)

Plaintiffs also contend that by permitting State Street to retain the float, SCE entered into a prohibited transaction under § 1106(a). Specifically, the statute prohibits a fiduciary from "caus[ing] the plan to engage in a transaction, if he knows or should know that such transaction constitutes a direct or indirect transfer to, or use by or for the benefit of a party in interest, of any assets of the plan." *Id.* § 1106(a)(1)(D). Plaintiffs contend that by retaining State Street as the Plan's trustee, and allowing State Street to retain float, Defendants allowed State Street to use assets of the Plan for State Street's own benefit.

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[13] Again, if the Court were to apply an abuse of discretion standard to Defendants' interpretation, the Court would reach the same conclusion.

First, the parties do not dispute that State Street is a party in interest. A "party in interest" is defined broadly to include "any fiduciary, a person providing services to the plan, an employer whose employees are covered by the plan, and certain shareholders and relatives." *Chao v. Hall Holding Co., Inc.*, 285 F.3d 415, 424 (6th Cir. 2002). Under this definition, as the Plan trustee, State Street would qualify as a party in interest.

It is unclear, however, what transaction Plaintiffs challenge, and which fiduciary Plaintiffs claim caused the plan to engage in such transaction. It appears that Plaintiffs challenge the overall relationship between SCE and State Street. The only relevant transaction identified in this regard, however, would be the Trust Agreement entered into between SCE and State Street. If this is the relevant transaction, then Plaintiffs' claim would appear to be barred by the six year statute of limitations because the Trust Agreement was signed in 1999. In claims for prohibited transactions, the statute of limitations typically begins when the transaction in question occurs. *See Martin*, 828 F. Supp. at 1431. Thus, Plaintiffs' claim for violation of § 1106(a)(1)(D) would appear to be barred.

Plaintiffs may allege that there was some subsequent transaction involved here. Depending on which transaction Plaintiffs identify, however, there could be questions of whether the fiduciary caused the Plan to engage in that transaction. Thus, the Court invites further briefing on this claim. Plaintiffs should identify

which specific transaction or transactions they challenge, and which specific fiduciary caused the Plan to engage in those transactions.

In addition to these issues, there are also issues with regard to Defendants' affirmative defense. Defendants contend that they have an absolute defense to a violation under § 1106(a)(1)(D) because they are protected by the safe harbor in § 1108(b)(2). Section 1108(b)(2) provides an exemption for "[c]ontracting or making reasonable arrangements with a party in interest for office space, or legal, accounting, or other services necessary for the establishment or operation of the plan, if no more than reasonable compensation is paid therefor." *Id.* Defendants contend that because float was part of State Street's compensation, allowing State Street to retain float was a "reasonable arrangement for services necessary for the operation of the plan," and that "no more than reasonable compensation [was] paid therefor." *See id.*

In order for the safe harbor to apply, however, the defendant must have actually "contracted" or made "reasonable arrangements" for services necessary for the operation of the plan. *See F.H. Krear & Co. v. Nineteen Named Trustees*, 810 F.2d 1250, 1258 (2d Cir. 1987); *Whitfield v. Tomasso*, 682 F. Supp. 1287, 1303 (E.D.N.Y. 1988). Here, however, there is a conspicuous lack of evidence that float was ever considered as part of State Street's compensation. The Trust Agreement, which was the contract that defined the compensation State Street would receive

for its services, did not mention float at all. The only evidence in support of Defendants' claim that float was considered is the testimony of Mr. Ertel, who said it was his "understanding" that State Street was allowed to retain the float. There is an email, however, from an employee at State Street, which suggests that State Street did not even record how much float it earned until 2002. (Pl.'s Ex. X1.) Thus, there may be a triable issue as to whether Defendants ever actually "contracted" or "made reasonable arrangements" for State Street's services to include float.

Defendants point to a portion in the contract which states that State Street shall be "paid such reasonable compensation as shall be from time to time agreed upon by the Sponsor and the Trustee." (Pl.'s Ex. U, at 27.) It would appear therefore, that the Trust Agreement leaves open the possibility that future agreements could be reached regarding additional compensation. Whether any such further agreement was reached addressing float as part of compensation, however, is unclear on the current record.

In addition, there is a dispute as to whether the amount of float State Street retained was "reasonable compensation" for the services State Street rendered. Defendants argue that the amount of compensation that State Street earned from float was reasonable because it was consistent with the other offers SCE received and never exceeded .03% of the total assets of the Plan. The significance and source of the .03% number, however, is unclear on the current record. In

response, Plaintiffs contend that the amount of float retained could not be reasonable because in 2006 alone, State Street retained $383,000 in float, which was more than twice the rate for State Street's annual services under the Trust Agreement. Neither party appears to have offered any expert opinion on this issue. As a result, the Court will accept further briefing on this issues [sic]. The parties should cite with specificity to evidence already in the record.

3. § 1106(b)(1)

Plaintiffs allege that by allowing State Street to retain float, Defendants violated § 1106(b)(1), which prohibits a fiduciary from "deal[ing] with the assets of the plan in his own interest or for his own account." *Id.* Plaintiffs appear to argue that SCE dealt with the assets of the Plan by entering into a Trust Agreement with State Street, whereby SCE paid State Street a flat fee of $150,000, which was artificially low on account of the fact that State Street would be able to keep the float. In light of the fact that SCE was otherwise obligated to pay the cost of State Street's trustee service, by negotiating an artificially low price, one might be able to conclude that SCE dealt with assets of the Plan for SCE's own interest or account.

If it is the Trust Agreement that Plaintiffs challenge, however, then this claim would appear to be barred by the six year statute of limitations, given that the Trust Agreement was signed in 1999. Plaintiffs

may have other conduct in mind, however, which could constitute a fiduciary dealing with the assets of the plan in his own interest or for his own account. Thus, the Court will invite Plaintiffs to more fully brief this issue in order to clearly identify what conduct is at issue and which specific fiduciaries Plaintiffs believe are responsible.

The Court also notes that if the theory identified is an accurate representation of Plaintiffs' claim, then the same question of fact identified in the preceding section could be relevant. That is, whether float was ever even considered as part of State Street's compensation in 1999, or any time thereafter, could be relevant to whether any fiduciary dealt with the assets of the Plan in his or her own interest.

Even assuming, however, that float was considered part of State Street's compensation, Plaintiffs will have to "demonstrate that [the fiduciary] *actually used* its power to deal with the assets of the plan for its own benefit or account." *Acosta v. Pacific Enters.*, 950 F.2d 611, 621 (9th Cir. 1991) (emphasis added). Thus, Plaintiffs would have to prove that if float was part of State Street's compensation, that SCE actually obtained an artificially lowered annual rate for State Street's services.[14]

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[14] As mentioned *supra*, the Court is inclined to find that the reasonable compensation exception in § 1108 does not apply to alleged violations of § 1106(b). *See Patelco*, 262 F.3d at 910.

G. Breach of Fiduciary Duty

Section 1104(a) imposes on fiduciaries both a duty of loyalty and a duty of care. First, fiduciaries must discharge their duties with respect to the plan solely in the interest of the participants and beneficiaries and for the exclusive purpose of providing benefits to participants. 29 U.S.C. § 1104(a)(1)(A). Second, fiduciaries must act with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character with like aims. *Id.* § 1104(a)(1)(B).

1. Duty of Loyalty – § 1104(a)(1)(A)

Plaintiffs contend that the fiduciaries in charge of selecting which mutual funds became investment options for the Plan participants, failed to discharge those duties solely in the interest of the participants. Plaintiffs contend that instead of choosing mutual funds that were the best investment options for the Plan participants, the fiduciaries chose mutual funds based on the amount of revenue sharing that was generated and to offset the amount that SCE owed for Hewitt's recordkeeping services. Under Plaintiffs' theory, certain Plan fiduciaries sacrificed the quality of the investment options made available to the Plan participants in order to maximize the benefit to SCE.

ERISA provides that a "fiduciary must discharge is obligations solely in the interests of the participants and beneficiaries." *Cunha v. Ward Foods, Inc.*, 804 F.2d 1418, 1432 (9th Cir. 1986). In other words, a fiduciary must "act with complete and undivided loyalty to the beneficiaries of the trust, and with an eye single to the interest of the participants and beneficiaries." *Leigh v. Engle*, 727 F.2d 113, 123 (7th Cir. 1984) (quotations omitted). This principle comes from the common law of trusts and has been called the "exclusive benefit" rule. *See, e.g., Washington-Baltimore Newspaper Guild Local 35 v. Washington Star Co.*, 555 F. Supp. 257, 259 (D.D.C.1983); DANIEL FISCHEL & JOHN H. LANGBEIN, ERISA'S FUNDAMENTAL CONTRADICTION: THE EXCLUSIVE BENEFIT RULE, 55 U. CHI. L. REV. 1105, 1128 (1988) [hereinafter THE EXCLUSIVE BENEFIT RULE] ("ERISA's exclusive benefit rule imports into pension fiduciary law one of the most fundamental and distinctive principles of trust law, the duty of loyalty.").

Despite the rule's apparent absolute nature, however, courts have recognized that a fiduciary does not necessarily violate the rule by pursuing a course of action that "incidentally benefits" the plan sponsor. *See, e.g., Morse v. Stanley*, 732 F.2d 1139, 1139 (2d Cir. 1984) ("It is no violation of a fiduciary's duties to take a course of action which reasonably best promotes the interest of the plan participants simply because it incidentally also benefits the corporation."); *Donovan v. Bierwirth*, 680 F.2d 263, 271 (2d Cir. 1982); *Lynch v. J.P. Stevens & Co., Inc.*, 758

F. Supp. 976, 999 (D.N.J. 1991) (quoting *Morse*). In one prominent case, the Second Circuit stated that "[a]lthough officers of a corporation who are trustees of its pension plan do not violate their duties as trustees by taking action which, after careful and impartial investigation, they reasonably conclude best to promote the interests of participants and beneficiaries simply because it *incidentally benefits* the corporation or, indeed, themselves, their decisions must be made with an eye single to the interests of the participants and beneficiaries." *Bierwirth*, 680 F.2d at 271 (emphasis added). Thus, it is not necessarily a breach of fiduciary duty to act in the best interests of both the plan participants and the plan sponsor. *See Siskind v. Sperry Ret. Program, Unisys*, 47 F.3d 498, 506 (2d Cir. 1995) (noting that it is not a breach of fiduciary duty to act "in the interest of both the plan's participants and the employer"); *Donovan v. Walton*, 609 F. Supp. 1221, 1246 (S.D. Fla. 1985) (finding no violation because the decisions were made to "primarily benefit" the participants despite the fact that the union benefitted as well and there was no evidence that the fiduciaries "intended to benefit the Union at the expense of the Fund members").

Indeed, in many circumstances, ERISA contemplates the fact that a fiduciary will "wear two hats," and may have conflicting loyalties. *See Cunha*, 804 F.2d at 1433 (citing *Amato v. Western Union Int'l, Inc.*, 596 F. Supp. 963, 968 (S.D.N.Y. 1984)); *Friend v. Sanwa Bank California*, 35 F.3d 466, 469 (9th Cir. 1994). However, a conflict of interest is not a per se

breach: "nowhere in the statute does ERISA explicitly prohibit a trustee from holding positions of dual loyalties." *Friend*, 35 F.3d at 469; *see also In re McKesson HBOC, Inc. ERISA Litig.*, 391 F. Supp. 2d 812, 834 (N.D. Cal. 2005).[15] Instead, in order to prove a violation of the duty of loyalty, the plaintiff must go further and show "actual disloyal conduct." *McKesson*, 391 F. Supp. 2d at 834-35.

Here, there is evidence in the record from which it may be possible to infer that certain fiduciaries chose mutual funds as investment options in order to maximize the pecuniary benefit to SCE, to the detriment of Plan participants. Plaintiffs have identified certain internal documents, which suggest that those involved in the decisions of which mutual funds to

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[15] In *Bierwirth*, the court suggested that there may be circumstances where a conflict of interest is so pronounced that it would be impossible for the fiduciary to act in the best interests of the plan participants. *See* 680 F.2d at 272. There, the court said that, "[l]ooking at the matter realistically, we find it almost impossible to see how [the trustees] . . could have voted to tender or even sell the Plan's stock, no matter how compelling the evidence for one or the other of those courses might have been." *Id.* Nonetheless, the court did not find that there was a per se breach, but rather that the trustees had acted imprudently in considering the correct course of action. *See id.* at 273; *see also Leigh v. Engle*, 727 F.2d 113, 125 (7th Cir. 1984) ("Where the potential for conflicts is substantial, it may be virtually impossible for fiduciaries to discharge their duties with an 'eye single' to the interests of the beneficiaries, and the fiduciaries may need to step aside, at least temporarily, from the management of assets where they face potentially conflicting interests."). Such is not the case here however.

select as investment options were aware of the effect of the revenue sharing on the amount Hewitt billed SCE for its recordkeeping services, and may have even improperly considered the revenue sharing when deciding whether to select certain mutual funds. For example, in one email David Ertel, a member of the Investments Staff, wrote to George Grana, to inform Mr. Grana that he was having Hewitt "look at fund share classes with lower expense ratios (even if there is no revenue sharing)." (Pl.'s Ex. 58.) Mr. Ertel further wrote: "if we delete funds that have a high revenue sharing with one that has none, is that still acceptable on an incremental basis?" (*Id.*) This email reveals that the existence and amount of revenue sharing offered by the mutual funds was taken into consideration when deciding what funds to add to the menu of investment options made available to Plan participants. When viewed in the light most favorable to Plaintiffs, this email could be interpreted to indicate that there was some hesitancy on th art of the fiduciaries to select mutual funds wit lower expense ratios (and lower cost to the Plan participants) because the funds with lower expense ratios may not have offered revenue sharing.

In another email, an employee from Hewitt wrote to another member of the Investments Staff, Marvin Tong, regarding a number of investment options that could be made available to the Plan participants. (Pl.'s Ex. 56.) The employee from Hewitt, Josh Cohen, mentioned that he had "included the expense ratio and revenue sharing for several of the share classes

that you will want to consider based on your needs." (*Id.*) Mr. Cohen further noted that there had been some "revenue sharing issues related to the Templeton Developing Markets Fund," and that Diane Kobashingwa "has been working with Franklin Templeton to resolve the issue." (*Id.*) Mr. Cohen further added that "[w]hile I don't think this will have a bearing on your decision to add a Franklin fund, you may want to let Diane know your intentions to do so." (*Id.*) Later in the email thread, Mr. Cohen wrote to Mr. Ertel to recap the "[c]riteria for selecting mutual funds per discussion with DFW and Mr. Ertel." (*Id.*) That criteria included: (1) "[e]xpense ratio is reasonable [b]etween classes," (2) "Morningstar rating is available," (3) "[w]orks in 3 main tracking sites (money.com; yahoo.com; moneycentral.com)," and (4) "[r]evenue sharing is favorable." (*Id.*) Again, this email suggests that the amount of revenue sharing was a consideration when deciding whether to add a given mutual fund to the Plan's menu of options. Viewing the evidence in the light most favorable to the Plaintiffs, a factfinder might even draw the inference that revenue sharing was more important than the expense ratio because the expense ratio was required to be "reasonable," whereas the revenue sharing was required to be "favorable."

In addition to these two emails, another fact supporting Plaintiffs' theory is the arrangement between the Plan, the mutual funds, and SCE, which created a structural conflict of interest, such that

SCE had an interest in maximizing the amount of revenue sharing from the mutual funds. This structural conflict of interest is revealed in the contract that the SCE Benefits Committee entered into with Fidelity Investments Institutional Services Company, Inc. ("FIRSCO"). (*See* Pl.'s Ex. P.) This contract, the "Plan Expense Reimbursement Agreement" ("Reimbursement Agreement"), memorializes an arrangement whereby a portion of the revenue sharing generated from Fidelity mutual funds was directed to pay for Hewitt's recordkeeping services. (*Id.*) The Reimbursement Agreement recites that the Plan fiduciary had selected Fidelity mutual funds for inclusion in the Plan, and provides that some of the revenue sharing from the mutual funds would be used to pay for recordkeeping services to the Plan. (*Id.*) The Reimbursement Agreement then sets forth a compensation schedule whereby the percentage of the revenue sharing paid to Hewitt increased in direct proportion to the amount of Plan assets that were invested in Fidelity mutual funds. (*Id.*) If the Plan invested $10 to $100 million with Fidelity mutual funds, Hewitt was paid .15% of the average daily balance; if the Plan invested $100 to $200 million with Fidelity, Hewitt was paid .20% of the average daily balance; and if more than $200 million was invested with Fidelity, then Hewitt was paid .25% of the average daily balance. (*Id.*)

This Reimbursement Agreement creates a structural arrangement whereby the amount of revenue sharing generated to offset Hewitt's recordkeeping

expenses was directly linked to the type of mutual funds that were chosen for inclusion as Plan investment options. Indeed, the amount of revenue sharing that SCE received actually increased depending on the amount that Plan participants invested in Fidelity mutual funds. This structural arrangement gave SCE a financial interest in seeing that the amount of Plan assets invested in Fidelity mutual funds would increase, such that SCE could obtain a larger offset to what it would otherwise owe Hewitt.

When viewing the emails identified above in combination with the incentive that SCE had to maximize the amount of revenue sharing from certain mutual funds, a rational trier of fact might be able to conclude that certain fiduciaries elevated the interests of SCE above those of the Plan participants when deciding which mutual funds to offer as options to the Plan participants. One might be able conclude that those responsible for choosing mutual funds for inclusion in the Plan were acting to maximize the amount of revenue sharing instead of fulfilling their duty to provide the Plan participants with the best investment options.

While there may be a triable issue in this regard, the Court notes that a breach of the duty of loyalty is not a necessary conclusion from this evidence. Indeed, there may be a perfectly innocent explanation for some of the evidence, which could lead to the conclusion that the fiduciaries actually were discharging their duties in the best interests of both the Plan participants and SCE. One internal email

communication reveals such a potentially innocent explanation. (*See* Pl.'s Ex. 50.) In that email Mr. Grana wrote to Barbara Decker, the Manager of Benefits for SCE, asking for her input on a draft response to a question posed by Mr. Ertel. (*Id.*) Mr. Grana noted that Mr. Ertel was "asking for clarification about fund selection and 12b1 fee offsets." (*Id.*) In a draft response, Mr. Grana wrote that "revenue sharing arrangements are only considered for fund selection when competing funds are otherwise comparable – similar strategies, objectives, performance expectations, expense loading, etc. (i.e. all other things being equal)." (*Id.*) Mr. Grana concluded by noting that SCE already factors the revenue sharing into SCE's administrative and communication budgets and that this information is fully disclosed to the Plan participants. (*Id.*) Thus, Mr. Grana wrote that "[w]e should continue to use a share class which offers a reasonable revenue sharing arrangement." (*Id.*)

Mr. Grana's email appears to convey a theory that revenue sharing could be considered in the mutual fund selection process only when all other relevant investment factors were perfectly equal. That is, there could be no sacrifice in the quality of the investment options, but that if two investment options were perfectly equivalent, then it was permissible to choose the one that generated revenue sharing, which could then be used to offset recordkeeping expenses. As discussed above, there is nothing wrong with a fiduciary taking an action that incidentally

benefits the sponsor company, so long as the fiduciary does not benefit the company at the expense of the plan participants. *See Morse*, 732 F.2d at 1139; *Bierwirth*, 680 F.2d at 271. If the method outlined by Mr. Grana was in fact how the relevant fiduciaries actually discharged their duties, then the Court would be reluctant to find that a breach of the duty of loyalty occurred.

Plaintiffs contend that further evidence of a breach of the duty of loyalty can be found in the fact that the retail mutual funds selected for inclusion as options for the Plan participants performed worse than the low-cost Russell funds that were previously included in the Plan. Plaintiffs' expert Mr. Pomerantz opines that if the Plan assets had been invested into low-cost Russell funds, the Plan would have saved $11.4 million to $14 million in fees and would have gained an additional $192 million in retirement savings. (Pomerantz Rep. ¶¶ 31, 43.) Plaintiffs contend that this poor performance shows that the fiduciaries were choosing retail mutual funds in order to maximize the amount of revenue sharing and, at the same time, sacrificing the investment quality.

The Court is not convinced, however, that a comparison between the performance of retail mutual funds actually chosen on the one hand, and the Russell funds that had previously been included in the Plan on the other, is the relevant comparison for these purposes. This is because there is undisputed evidence that during the course of the 1998 negotiations with the unions, the union representatives (on

behalf of the employees) requested that retail mutual funds be made available to Plan participants. (*See* Decker Decl., Ex. K, at 1.) Ms. Decker testified at her deposition that the unions sought name-brand mutual funds, instead of the Russell funds that had previously been included in the Plan. (*See* SUF ¶¶ 17-20.) Mr. Ertel initially presented the unions with a selection of twenty retail mutual funds, but the unions wanted more, and the parties agreed to a selection of forty different retail mutual funds. (*Id.* ¶¶ 18, 20.) Ms. Decker states that she explained the differences between the low-cost Russell funds, and the retail funds, which charged higher fees to the investors. (Decker Decl. ¶ 9.) Despite these apparent disadvantages with the retail mutual funds, the union representatives requested that retail mutual funds be included as an investment option for the Plan participants. (*Id.*)

In light of the fact that the Plan participants requested retail mutual funds as an investment options [sic], and this was an integral part of the 1998-1999 collective bargaining agreement, there could be no disloyal conduct simply because the Russell funds that had been included previously outperformed the retail mutual funds that were added. In fact, in light of these demands from the Plan participants, it could be said that by including retail mutual funds, the Plan fiduciaries were actually fulfilling their duty to act with complete loyalty to their constituents. The Plan participants made their desires known through

their union bargaining representatives, and the Plan fiduciaries executed on those desires.

Particularly relevant to the issue of whether Defendants breached their duty of loyalty here is an article addressing the exclusive benefit rule written by Professors Daniel Fischel and John Langbein, and published in the University of Chicago Law Review. *See* THE EXCLUSIVE BENEFIT RULE, 55 U. CHI. L. REV. 1105 (1988). In the article, the authors express their view that the exclusive benefit rule is essentially a misnomer because it "misdescribes the reality of the modern pension and employee benefit trust" by oversimplifying the many relationships between the parties in interest. *Id.* at 1107. They write that the analogy to a simple trust model is not necessarily accurate because:

> In the employee benefit situation, the settlor's welfare is also maximized if the beneficiaries capture the benefits resulting from the trust. The difference is that employers and employees act in both capacities. The trust exists to maximize the joint welfare of both. Moreover, because the employer and the employees continually monitor the performance of the trustee of an employee benefit plan, there may be less need for strict fiduciary duties that limit the discretion of the trustee to engage in conduct that may be mutually beneficial to both groups.

Id. at 1119.

In order to deal with some of the tension between the exclusive benefit rule and the fact that, under ERISA, the relevant fiduciaries often have interest in the outcome of the plan, the authors propose that the duty of loyalty be analyzed from an ex ante, rather than purely from an ex post perspective. *Id.* at 1127. They note that when an fiduciary's action is examined from the ex post perspective, "a rule allowing the employer's representative to make decisions on behalf of the trust appears to be inconsistent with the exclusive benefit rule," because oftentimes, it appears that the action taken in fact benefitted the employer. *Id.* If, however, the same action is viewed from the ex ante perspective, and the question is posed in terms of what the parties would have agreed to had they bargained beforehand, the authors argue that this apparent inconsistency abates. *Id.*

Analyzing the Second Circuit's decision in *Bierwirth*, the authors argue that Judge Friendly "attempted to reconcile the exclusive benefit rule with the nonneutral fiduciary [principle] by downplaying the conflict," and by characterizing the benefit to the employer as "incidental." *Id.* The authors write:

> The device of characterizing the benefit to the employer as "incidental" misses the point by confusing the ex ante and ex post perspectives. The relevant question is not whether the trustee's conduct creates only an "incidental" benefit to the employer ex post, a difficult and ultimately futile inquiry. Rather, the relevant question is whether the trustee's

> conduct is consistent with the understanding that the employees and the employer would have reached had they bargained over the issue ex ante.

Id. at 1128.

The authors do not fault Judge Friendly for the resulting doctrinal confusion: "That so distinguished a jurist as Judge Friendly could find no better rationale for self-interested behavior by nonneutral fiduciaries than to call it incidental is a measure of the power of the exclusive benefit rule to mislead courts about the reality of pension and benefit plans." *Id.* Thus, the authors argue that by shifting perspective from the ex post analysis to the ex ante analysis, much of the confusion with regard to the meaning of the exclusive benefit rule can be avoided. *Id.*

This thesis is especially relevant here because when applying the ex ante perspective, instead of asking whether SCE incidentally benefitted from the inclusion of retail mutual funds, the question is whether the parties would have agreed beforehand to include retail mutual funds that generated revenue sharing. Indeed, not only is there evidence that the parties *would have* agreed to the inclusion of retail mutual funds, but that they *actually* agreed to their inclusion. Thus, under this rubric, the fiduciaries should not be liable for including retail mutual funds because the Plan participants actually wanted retail mutual funds.

This is consistent with Ninth Circuit law in this area, which states that "ERISA does not create an exclusive duty to maximize pecuniary benefits" to the Plan participants. *See Collins*, 144 F.3d at 1282. The Court is not aware of any rule under ERISA that says a Plan fiduciary must disregard Plan participants' wishes for certain investment options simply because better investment options may be available. So long as the participants' requests are reasonable, a Plan fiduciary should not be liable for breach of fiduciary duty simply by offering an investment option that the Plan participants desire.[16]

Thus, the relevant inquiry does not appear to be the quality of the Russell funds versus the retail mutual funds that were included in the Plan. Rather, it appears that the relevant inquiry is between the quality of the retail mutual funds that were included in the Plan, versus other comparable retail mutual funds that were available and that did not offer revenue sharing. The evidence in this regard is not entirely clear on the current record.

Another particularly relevant indicator that appears to be missing is a comparison between the expense ratios of the mutual funds that were included in the Plan versus the expense ratios of other mutual

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[16] There could be circumstances where an investment option requested by the participants is so clearly imprudent that to include it in the plan would constitute a breach of fiduciary duty. Including an array of commonly used retail mutual funds, however, is not such a situation.

funds. Especially relevant in this regard would be whether the funds that did not offer revenue sharing had lower expense ratios than those included in the Plan. Although the Plan participants may have asked for retail mutual funds, it is unlikely that they specifically asked for retail mutual funds that generated revenue sharing. Thus, if it were to turn out that the mutual funds that offered revenue sharing had higher expense ratios, and those funds were chosen for selection over funds that did not offer revenue sharing and had lower expense ratios, then this could be evidence that investment selections were being made to maximize the benefit to SCE instead of to the Plan participants.

Even if the retail mutual funds that were included in the Plan performed more poorly than other mutual funds or had higher expense ratios, these facts alone would not be sufficient to show a breach of the duty of loyalty. Plaintiffs will have to go further and show that the Defendant fiduciaries chose a weaker retail mutual fund over a stronger retail mutual fund, *because of* the fact that the weaker retail mutual fund offered revenue sharing and the stronger retail mutual fund did not. *See McKesson*, 391 F. Supp. 2d at 834 (noting that a breach of the duty of loyalty requires "actual disloyal conduct"). In the Court's view, it is only under such circumstances that a breach of the duty of loyalty would be shown.

Whether Defendants disclosed the revenue sharing arrangement to the Plan participants may also be circumstantial evidence of whether the fiduciaries

acted in the best interests of the Plan participants. The Ninth Circuit has said that one component of a fiduciary's "core obligation" under § 1104(a)(1)(A) is "the duty not to make affirmative material misrepresentations to plan participants." *Mathews v. Chevron Corp.*, 362 F.3d 1172, 1180 (9th Cir. 2004). To the extent that a fiduciary does not disclose what he or she is doing with the plan assets, or actively conceals such information, the inference may be drawn that the fiduciary is not acting in exclusively in the plan participants' best interests. *See id.* at 1182.

The undisputed evidence on this score, however, shows that Defendants disclosed the fact that revenue sharing from the mutual funds was being used in order to offset Hewitt's recordkeeping costs. During the collective bargaining process with the unions, Ms. Decker personally walked the union representatives through the process by which revenue sharing would be used to pay for recordkeeping expenses. (SUF ¶ 38.) Indeed, on approximately seventeen different occasions since 1999, Defendants disclosed to the Plan participants through SPDs and other informational documents that revenue sharing from the mutual funds was being used to offset Hewitt's recordkeeping expenses. (*Id.* ¶ 32.) In light of these undisputed facts, Plaintiffs are unlikely to gain much traction by arguing that the revenue sharing was concealed.

There is one final reason why the evidence in the record suggesting that revenue sharing was considered in choosing mutual funds does not necessarily

lead to the conclusion that the fiduciaries breached their duty of loyalty. Nearly all of the internal emails identified above involved members of the Investments Staff. The Investments Staff, however, did not have final say over whether a certain mutual fund was approved for inclusion in the Plan – those decisions were made by the TIC or Sub-TIC. (*See* Pl.'s Supp. Brief, at 1.) It is unclear to what extent and how members of the TIC or Sub-TIC considered revenue sharing when making their final decisions. Furthermore, it is possible that the Investments Staff played such a predominant role in the mutual fund selection process, that by the time the options were presented to the TIC or Sub-TIC, they were only presented with mutual fund options that offered revenue sharing. It is unclear whether the TIC or Sub-TIC ever considered investment options that were not put forth by the Investments Staff or whether the options presented by the Investments Staff included mutual funds with no revenue sharing.[17]

In sum, the Court finds that certain internal communications, when viewed in the light most favorable to Plaintiffs, could be interpreted as revealing that individuals involved in the mutual fund selection process were impermissibly considering revenue sharing when deciding which mutual funds would become investment options for the Plan participants. These emails in combination with the existing

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[17] There may also be an issue with regard to whether the Investments Staff was a fiduciary depending on how much control it had over the investment selection process.

structural conflict of interest, whereby SCE directly benefitted from the selection of mutual funds that offered revenue sharing, create a triable issue as to whether certain fiduciaries acted disloyally when choosing certain mutual funds. On the other hand, however, the evidence does not necessarily lead to the conclusion that there was a breach of the duty of loyalty. Indeed, some of this evidence suggests that the fiduciaries were selecting funds for the permissible purpose of benefitting both the Plan participants and SCE. Thus, it will be necessary to receive further evidence and to hear testimony from the relevant fiduciaries in order to determine whether they actually acted disloyally when making investment decisions for the Plan.

Defendants contend that the Seventh Circuit's decision in *Hecker* involved similar facts to our case, and there the court dismissed the plaintiff's case at the pleading stage. *See* 556 F.3d at 597. Indeed, in *Hecker* there was some mention of an arrangement whereby the plan sponsor, Deere & Company, used revenue sharing from the mutual funds in order to pay for certain administrative costs. *Id.* The court noted that the amount that Deere paid for administrative costs "decreased over time," as the plan administrator recovered most of its costs from the plan participants apparently through revenue sharing. *Id.* The court summarily dismissed any notion that such an arrangement could form the basis for a breach of fiduciary duty, stating that the plaintiffs' "case depends on the proposition that there is something wrong, for ERISA purposes, in that arrangement." *Id.*

The Seventh Circuit agreed with the district court, however, and found that "such an arrangement (assuming at this stage that the Complaint accurately described it) violates no statute or regulation." *Id.* The court then went on to analyze the allegations in the complaint under a misrepresentation or failure to disclose theory of breach of fiduciary duty. *Id.* The court noted that the plaintiffs "feel misled because the SPD supplements left them with the impression that Deere was paying the administrative costs of the Plans, even though in reality the participants were paying through the revenue sharing system we have described." *Id.* The court found that the revenue sharing arrangement had been fully disclosed and that, while Deere may not have been behaving admirably by creating the impression that it was paying the administrative costs, the complaint did "not allege any particular dollar amount that was fraudulently stated." *Id.* Thus, the court found that there had been no intentionally misleading statement or material omission that could have formed the basis for liability. *Id.*

The Court's decision in this case is consistent with the Seventh Circuit's opinion in *Hecker.* The Court agrees with the Seventh Circuit that there is nothing inherently wrong with using revenue sharing from mutual funds in order to offset some of the administrative costs that might otherwise be borne by the plan sponsor. The problem occurs only when the relevant fiduciaries make investment decisions not because they are in the best interest of the Plan

participants, but in order to maximize the amount of revenue sharing that is generated for the benefit of the plan sponsor. Apparently no such allegation was made in *Hecker* because the court analyzed the case purely under a failure to disclose theory. This case, however, is not simply about whether a conflict of interest was disclosed or not. Rather, the issue is whether the relevant fiduciaries were actually acting in the best interests of the Plan participants. As discussed above, there is evidence in this case that could reasonably be interpreted as demonstrating that such a breach of the duty of loyalty actually took place. Thus, while this case is consistent with *Hecker*, at the same time it includes an additional allegation of disloyal conduct (arguably supported by some evidence) that was not addressed in *Hecker*.[18]

Furthermore, Plaintiffs' claims for breach of the duty of loyalty appear not to be barred in full by the statute of limitations because there was an independent breach each time a fiduciary chose a mutual fund for inclusion in the Plan in order to maximize

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[18] This case is also distinguishable as well from *Taylor v. United Technologies Corp.*, 2009 WL 535779 (D. Conn. 2009). There, the court granted summary judgment for the defendant in part because "plaintiffs['] evidence fails to evince that defendant was motivated by a potential discount to its recordkeeping fee when it selected three Fidelity mutual funds." *Id.* at *10. By contrast, here, there is some evidence that could be interpreted to reveal that the fiduciaries were motivated by the discount to the recordkeeping fee.

revenue sharing to the detriment of the Plan participants. Thus, to the extent that such decisions were made after August 16, 2001, these claims would not be barred by the statute of limitations.

2. § 1104(a)(1)(B)

Plaintiffs contend that many of the investments options given to Plan participants were imprudently selected and/or imprudently managed. Section 1104(a)(1)(B) provides that a fiduciary must act "with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims." *Id.*

"When applying the prudence rule, the primary question is whether the fiduciaries, 'at the time they engaged in the challenged transactions, employed the appropriate methods to investigate the merits of the investment and to structure the investment.'" *California Ironworkers Field Pension Trust v. Loomis Sayles & Co.*, 259 F.3d 1036, 1043 (9th Cir. 2001) (quoting *Donovan v. Mazzola*, 716 F.2d 1226, 1232 (9th Cir. 1983)); *see also Wright*, 360 F.3d at 1097 (quoting *Mazzola*). Whether a fiduciary acted prudently cannot be measured solely from the perspective of hindsight; rather, the question is whether the fiduciary conducted himself in the appropriate manner and considered the appropriate factors when making his decisions. *See DiFelice v. U.S. Airways,*

Inc., 497 F.3d 410, 424 (4th Cir. 2007); *Kanawi v. Bechtel Corp.*, 590 F. Supp. 2d 1213, 1230 (N.D. Cal. 2008) ("Of course, the test of prudence is one of conduct and not performance. It is easy to opine in retrospect that the Plan's managers should have made different decisions, but such 20/20 hindsight musings are not sufficient to maintain a cause of action alleging a breach of fiduciary duty.").

The DOL has issued regulations outlining what factors a fiduciary should consider in order to make a prudent investment decision. The regulation states that a fiduciary discharges his fiduciary duties if the fiduciary:

> Has given appropriate consideration to those facts and circumstances that, given the scope of such fiduciary's investment duties, the fiduciary knows or should know are relevant to the particular investment or investment course of action involved, including the role the investment or investment course of action plays in the portion of the plan's investment portfolio with respect to which the fiduciary has investment duties; and has acted accordingly.

29 C.F.R. § 2550.404a-1(b)(1).

The regulation goes on to state that "appropriate consideration" shall include, but is not necessarily limited to:

> (i) A determination by the fiduciary that the particular investment or investment

> course of action is reasonably designed, as part of the portfolio (or, where applicable, that portion of the plan portfolio with respect to which the fiduciary has investment duties), to further the purposes of the plan, taking into consideration the risk of loss and the opportunity for gain (or other return) associated with the investment or investment course of action, and
>
> (ii) Consideration of the following factors as they relate to such portion of the portfolio:
>
> (A) The composition of the portfolio with regard to diversification;
>
> (B) The liquidity and current return of the portfolio relative to the anticipated cash flow requirements of the plan; and
>
> (C) The projected return of the portfolio relative to the funding objectives of the plan.

Id. § 2550.404a-1(b)(2).

Plaintiffs challenge the following investment decisions: (1) the decision to include retail mutual funds as an investment option; (2) the decision to include certain sector-specific mutual funds, and failure to remove them once they began to underperform; (3) the decision to include a money market fund rather than a stable value fund; and (4) the allegedly poor management of the Edison stock fund.

a. Retail Mutual Funds

Plaintiffs contend that Defendants breached their fiduciary duties by including retail mutual funds as investment options for the Plan participants. Plaintiffs contend that the decision to include retail mutual funds is nearly per se imprudent, because retail mutual funds deduct more fees and expenses from the investment assets than other low-cost alternatives.

Plaintiffs' critique of the mutual funds, however, is largely based on an ex post examination of how they performed in comparison to the Russell funds that had previously been included in the Plan. For example, Plaintiffs' expert opines that the comparable Russell funds outperformed the retail mutual funds by $187.2 million during the relevant time period. (Pomerantz Rep. ¶ 43.)

First, the reliability of this expert opinion is questionable because Mr. Pomerantz does not explain how he determined what were "comparable" Russell funds for the purpose of determining the mutual funds' underperformance. (*See* Def.'s Mot. to Exclude Pomerantz Rep., at 10.) Even assuming the reliability of Mr. Pomerantz's methodology, however, the Court finds that the relevant comparison here is not to the Russell funds that were previously included in the Plan. As discussed earlier, the primary reason for including the retail mutual funds was the fact that the Plan participants expressed a desire to have such options during the collective bargaining process. The

undisputed evidence reveals that union representatives requested a total of forty name-brand retail mutual funds for inclusion in the Plan. (SUF ¶¶ 17-20.) Plaintiffs suggest that it was imprudent for Defendants to have complied with the union's demands, and should have denied the request for retail mutual funds. There is nothing wrong, however, with a fiduciary giving Plan participants the reasonable investment options that they seek.[19] Indeed, there is no requirement that fiduciaries override the wishes of the participants, especially under circumstances such as this, where retail mutual funds are common investment options available to the public at large. *See Collins*, 144 F.3d at 1282 ("ERISA does not create an exclusive duty to maximize pecuniary benefits.").

Given that the Plan participants requested the inclusion of retail mutual funds, in order to prove underperformance, Plaintiffs would have to show that the retail mutual funds that were actually chosen for inclusion in the Plan underperformed as compared to other retail mutual funds that were available on the market. Plaintiffs have not identified any evidence in this regard. Indeed, Mr. Pomerantz's report focuses exclusively on a comparison of the retail mutual funds to "comparable" Russell funds. (Pomerantz Rep. ¶ 43.) Mr. Pomerantz does not explain whether, at the time the retail mutual funds were chosen for selection in the Plan, Russell funds had historically outperformed

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[19] *See supra* note 16.

retail mutual funds, and if so, to what extent. Thus, Plaintiffs have not met their burden to create a triable issue as to underperformance.

Even assuming that the retail funds underperformed, however, underperformance alone is insufficient to show a breach of the duty of prudence. In *Kanawi*, the court rejected the plaintiff's claim that the inclusion of certain mutual funds were imprudent based in part on evidence that certain funds had underperformed. 590 F. Supp. 2d at 1229. The court noted that despite the underperformance, the plan offered six different investment options at various levels of risk, the plan's structure was comparable to other defined contribution plans, the fiduciaries regularly reviewed the investment options and considered alternatives, and the overall performance of the mutual funds were competitive with the industry standard. *Id.* at 1230.

The evidence shows that these same factors are present here. The Plan offered a wide variety of investment options including the forty retail mutual funds, along with three pre-mixed portfolios, commingled funds (including stock index funds), the Edison stock fund, and a money market fund. (*See* SUF ¶¶ 24-26.) Furthermore, the evidence reveals that the Plan was comparable to other defined contribution plans, which also regularly include retail mutual funds. (*See* Peavy Rep., Ex. 5.) The undisputed evidence also reveals that the fiduciaries regularly reviewed the mutual funds included in the Plan, and in fact removed certain funds when their performance

was in question. (*See* SUF ¶¶ 54-59, 61-68.) Finally, the overall performance of the mutual funds compared favorably to other benchmarks. (Peavy Rep. ¶¶ 79-87.) Thus, Plaintiffs' claim that it was generally imprudent to include retail mutual funds as investment options is rejected.

Furthermore, the evidence shows that certain low-cost Russell funds were retained as part of the investment options given to Plan participants during the relevant time period. Even after the retail mutual funds were added to the Plan, the various Russell index funds were included in the Plan, which gave the participants a low-cost alternative to the retail mutual funds. (*See* Niden Rep., Ex. C.) Thus, Plan participants had the option of investing in a low-cost Russell fund if they wished, and certainly were not compelled to invest in the retail mutual funds.

Plaintiffs also challenge the decision to include retail mutual funds because of the amount of fees that the retail mutual funds charged. Plaintiffs contend that the Plan could have saved anywhere from $11 million to $15 million in fees alone by investing in a lower cost investment option. (*See* Pomerantz Rep. ¶ 31.) Again, Mr. Pomerantz focuses solely on an examination of the retail mutual funds as compared to the Russell funds. (*Id.*) As explained earlier, however, this is not the relevant comparison. Plaintiffs have not identified any evidence comparing the fees charged by the retail mutual funds actually included in the Plan, with other retail mutual funds in the market.

Furthermore, in *Hecker*, the Seventh Circuit rejected a similar argument noting that the mutual funds selected for inclusion had a "wide range of expense ratios," from .07% at the low end, to 1% at the high end. 556 F.3d at 586. The court also noted that all of the funds were offered to investors in the general public, and so the expense ratios were set against the backdrop of market competition. *Id.* The court concluded that "[t]he fact that it is possible that some other funds might have had even lower ratios is beside the point; nothing in ERISA requires every fiduciary to scour the market to find and offer the cheapest possible fund (which might, of course, be plagued by other problems)." *Id.*

Here, the funds included as options for the Plan participants had expense ratios from .03% at the low end, to 2% at the high end. (*See* Niden Rep., Ex. C.) In light of this broad range of expense ratios, the fact that funds with lower expense ratios could have been chosen, is not especially persuasive. Thus, Plaintiffs' claim that it was imprudent to select funds with such high fees is rejected.

Thus, Defendant's Motion for Summary Judgment is granted with regard to Plaintiffs' claim that it was imprudent to include retail mutual funds as investment options.

b. Sector Funds

Plaintiffs argue that it was generally imprudent for Defendants to add sector funds in 1999, and also

that one fund in particular, the T. Rowe Price Science & Technology Fund, was an imprudent investment decision. As to the first, the evidence shows that sector funds are a common component of many defined contribution plans. (*See* Peavy Rep. ¶ 28 (noting that 30% of 401(k) plans offer sector-specific funds).) Furthermore, the evidence reveals that the Plan participants demanded sector funds during the 1999 collective bargaining process. (SUF ¶ 20.) Thus, it is not imprudent under these circumstances to include sector funds as options for the Plan participants.

Plaintiffs are highly critical of the T. Rowe Price Science & Technology Fund. Plaintiffs argue that it performed poorly for the three years before it was selected for inclusion in 1999, and that during the time that it was included as an investment option, its Morningstar rating dropped from four to two stars. The evidence reveals, however, that although the Science & Technology Fund had experienced subpar returns in recent years, its ten-year performance rating was strong at the time it was selected. (SUF ¶ 71.) Indeed, the Investments Staff appropriately relied on its four-star Morningstar rating when making its decision to offer the fund as an investment option. (*See id.*)

As to the fund's subsequent performance, the evidence shows that once the Science & Technology Fund's performance began to deteriorate, it was placed on a watch list, participants were no longer allowed to invest new money into the fund, and it was ultimately removed from the Plan in 2003. (*See id.*

¶¶ 73, 74.) These management decisions reveal that the relevant fiduciaries chose and then managed the Science & Technology Fund in a prudent manner.

Plaintiffs argue that it took too long to remove the Science & Technology Fund from the Plan, and the reason for the delay was the fact that SCE was receiving revenue sharing from T. Rowe Price in connection to this fund. Plaintiffs, however, have not presented any evidence to support this theory that retaining the fund was due to a conflict of interest. None of the evidence cited earlier with regard to the possible selection of funds based on revenue sharing pertained specifically to this fund. Therefore, Defendants' Motion for Summary Judgment is granted with respect to the claim for imprudent selection and management of the Science & Technology Fund.

c. Money Market

Plaintiffs contend that it was imprudent for Defendants to include a money market fund rather than a "stable value fund." A "stable value fund" is a fund that seeks to provide income while at the same time preventing price fluctuations. (*See* Peavy Rep. ¶ 53.) Most often, these funds consist of a diversified portfolio of bonds. (*Id.*) Plaintiffs argue that a stable value fund would have saved the Plan $2.1 million in fees and would have provided greater return to the Plan participants.

The undisputed evidence, however, reveals that Defendants considered the possibility of including a

stable value fund, but instead decided on a money market because the money market fund would provide more consistent returns and have lower risk. (Eastus Decl., Ex. E, at 126-28.) Indeed, Defendants' expert states that in 2005 and 2006, 58% of defined contribution plans offered a money market fund. (Peavy Rep. ¶ 50.) A 2008 survey shows that 40% of funds offer only a money market fund, and no stable value fund. (*Id.*)

Plaintiffs argue that there is a question of fact as to whether Mr. Ertel ever actually considered including a stable value fund. Plaintiffs cite to an email from Pam Hess at Hewitt from 2007, in which Ms. Hess writes: "Now, I still want to make a plea for stable value!" (Pl.'s Ex. 87.) This email, however, actually supports Defendants' position because it suggests that there had been discussions between Ms. Hess and Mr. Ertel regarding the inclusion of a stable value fund. Plaintiffs also claim that there was no evidence that the possibility of including a stable value fund was ever brought to the attention of the TIC or Sub-TIC. Simply because the issue was not raised before the committees, however, does not create a triable issue of fact as to whether Mr. Ertel considered a stable value fund as an investment option. Rather, the undisputed evidence reveals that Mr. Ertel did consider such an option, and based on the risk and return involved with such a stable value fund, he decided that a money market fund would be a better option. Indeed, the evidence shows that the money market fund performed satisfactorily over the

relevant time period. (SUF ¶ 101.) Thus, Defendants' Motion for Summary Judgment with regard to the prudence of the money market fund is granted.

d. Edison Stock Fund

Plaintiffs also challenge the decision to structure the Edison stock fund as a unitized fund instead of a direct ownership fund, which allegedly resulted in the Edison stock fund holding too much cash. The sale of a share of common stock typically does not settle until three days after the sale. (*See id.* ¶ 110.) With a unitized stock fund, however, the Plan participants are allowed to essentially settle their stock trades within one business day, but as a result, the fund has to carry cash in order to cover those sales. (*See id.* ¶ 109.) Holding a certain level of cash in the fund instead of investing it in stock, typically leads to some loss in return to the participants. Plaintiffs rely on the expert opinion of Ross Miller, who opines that structuring the Edison stock fund as a unitized fund resulted in a loss of approximately $118 million in underperformance. (Miller Rep., at 1.)

Here, the undisputed evidence reveals that the Plan participants wanted the ability to execute faster trades in Edison stock. (SUF ¶ 11.) Indeed, offering faster trades was expressly included as one of the additional terms to the Plan as a result of the collective bargaining process. (Decker Decl., Ex. K.) Moreover, the Plan fiduciaries monitored the amount of

cash that was being held in the Edison stock fund and made needed adjustments accordingly. (SUF ¶ 111.)

Two recent cases are relevant to this analysis. First, in *Taylor v. United Technologies Corp.*, 2009 WL 535779 (D. Conn. 2009), the court rejected the plaintiffs' challenge to cash held in a unitized stock fund. The court found that the decision to provide a unitized stock fund was not imprudent because "[a]lthough an expert may have proposed a better alternative to UTC's unitized stock plan, UTC was not obligated to proceed with that alternative since its decision to proceed with the extant unitized stock plan was prudent." *Id.* at *9. The court further found that the defendants had evaluated and monitored the amount of cash necessary to cover the sales of stock without having a significantly adverse impact on the fund's returns. *Id.* The court noted as an example one instance where, when faced with concerns of a large stock sell-off the fiduciaries increased the amount of cash, only to reduce the level of cash in the fund. *Id.* The court concluded that "[t]he fact that plaintiffs may have been able to enjoy a greater Fund performance without a cash retention is not sufficient to support a claim of fiduciary breach where a defendant has engaged in prudent analysis of its decision." *Id.*

Similarly, here, the evidence shows that the Edison Stock Fund was structured as a unitized fund in order to give the Plan participants the ability to make faster trades. Furthermore, the relevant fiduciaries monitored the amount of cash in the Edison Stock Fund in order to make sure that it was not

holding more than was required at any given time. For example, in July 2004, the issue of how much cash should be held in the Edison Stock Fund was raised at a Sub-TIC meeting. (Ertel Decl., Ex. N.) In light of the fact that there had been decreased levels of active trading in the Edison Stock Fund, the Sub-TIC reduced the cash target within the fund to four percent. (*Id.*) Thus, the evidence reveals that Defendants prudently managed the amount of cash that was in the Edison Stock Fund.

In *Abbott v. Lockheed Martin Corp.*, 2009 WL 839099 (S.D. Ill. 2009), the court found a triable issue of fact as to whether the amount of cash held in the plan's unitized stock fund was prudent. There was evidence that the amount of cash held in the fund "actually exceeded the 10% ceiling" that had previously been established in order to minimize the amount of cash in the fund. *Id.* at *12.

Unlike *Abbott*, however, Plaintiffs have not identified any comparable evidence that the fiduciaries held more cash than was permitted under the Plan. Instead, the evidence shows that the fiduciaries monitored the amount of cash and made adjustments when needed in order to accommodate the trading needs of the Plan participants.

Defendants' expert, Mr. Peavy, makes another point with regard to the benefits of having a unitized stock fund that carries some cash. (Peavy Rep. ¶ 57.) A unitized stock fund only underperforms if the value of the stock is increasing at a rate greater than the

rate of return of the money market fund in which the cash is being held. (*Id.*) If, however, the value of the stock is on the decline or increasing at a slower rate that [sic] the money market fund, the unitized stock fund will actually outperform the Edison stock. (*Id.*) Thus, when deciding whether to include a unitized stock fund, the fiduciaries could not be sure that including a unitized fund would either benefit or harm the Plan participants. In fact, the inclusion of the unitized stock fund could be considered a more conservative, and therefore prudent, decision because having some cash component can actually decrease the volatility of the fund. (*Id.*)

Thus, Defendants' Motion for Summary Judgment with regard to the prudence of the Edison Stock Fund is granted.

3. Statute of Limitations

As an independent basis, Plaintiffs' claims for breach of the duty of prudence are barred in many respects by the six year statute of limitations, which began on August 16, 2001. For example, it is undisputed that the initial decision to add retail mutual funds, including the sector funds, as an option in the Plan was made in 1999 and 2000. (*See* Decker Decl., Ex. K.) Mr. Ertel made the decision to maintain the Money Market Fund instead of use [sic] a stable value fund in 1999. (Eastus Decl., Ex. E, at 127.) Furthermore, the Edison Stock Fund was established as a unitized stock fund as early as January 25, 2001. (*See*

Peavy Rep. ¶ 60.) Thus, the prudence claims arising out of these decisions are barred by the statute of limitations.

4. Safe Harbor – § 1104(c)

Defendants contend that Plaintiffs' claims for breach of fiduciary duty pursuant to § 1104(a) are barred by the safe harbor provision found at § 1104(c). The safe harbor provides as follows:

> (1)(A) In the case of a pension plan which provides for individual accounts and permits a participant or beneficiary to exercise control over the assets in his account, if a participant or beneficiary exercises control over the assets in his account –
>
> (ii) no person who is otherwise a fiduciary shall be liable under this part for any loss, or by reason of any breach, which results from such participant's or beneficiary's exercise of control.

29 U.S.C. § 1104(c)(1)(A).

"The safe harbor provided by § 1104(c) is an affirmative defense to a claim for breach of fiduciary duty under ERISA." *Hecker*, 556 F.3d at 588. In order for the safe harbor defense to apply, several different factors must be present. First, the participant must have the right to exercise independent control over the assets in his or her account and must in fact

exercise such control. 29 C.F.R. § 2550.404c-1(b)(1). Next, the participant must be able to choose from a broad range of investment alternatives, which requires at least three investment options and the plan must permit the participant to give instructions to the plan with respect to those options once every three months. *Id.* § 2550.404c-1(b)(2). Third, the participant must be given or have the opportunity to obtain sufficient information to make informed decisions with regard to investment alternatives available under the plan. *Id.* Nine criteria must be met before the participant will be considered to have sufficient investment information. *Id.* These include (1) clear labeling of the plan as a § 1104(c) instrument, (2) a description of the investment alternatives available, (3) identification of designated investment managers, (4) explanation of how to give investment instructions, (5) a description of any transaction fees and expenses that affect the participant's balance in connection with purchases of sales of interests, (6) relevant names and addresses of plan fiduciaries, (7) special rules for employer securities, (8) special rules for investment alternatives subject to the Securities Act of 1933, and (9) material related to voting, tender, or other rights incidental to the holdings in the account. *Id.*

Even if all of these conditions are satisfied, there has been some dispute as to whether this safe harbor protects a fiduciary from his or her own imprudent or disloyal actions in connection with a plan. The DOL has taken the position that § 1104(c) does not shield a

fiduciary from liability for claims of imprudent or disloyal selection of investment options. *See Kanawi*, 590 F. Supp. 2d at 1232. Several courts have followed the DOL's lead and refused to apply the § 1104(c) safe harbor under such circumstances. *See, e.g., DiFelice v. U.S. Airways, Inc.*, 497 F.3d 410, 418 n.3 (4th Cir. 2007); *id.* In *Kanawi*, the court followed the DOL's interpretation noting that it comports with commonsense because "[w]here the options available to participants are tainted by conflicts of interest or imprudent management, a party should not be able to avoid liability simply by providing participants the opportunity to exercise control over their accounts." 590 F. Supp. 2d at 1232.

In *Hecker*, however, the Seventh Circuit suggested that in some circumstances, it may be appropriate for the § 1104(c) safe harbor to completely shield fiduciaries from liability, even in the face of imprudent and/or disloyal management. 556 F.3d at 589. There, the plan participants were offered a menu of 26 different investment options, which included 23 mutual funds. *Id.* at 578. In addition, the plan also provided a "mutual fund window" that made available 2,500 additional mutual funds to the participants. *Id.* In considering the § 1104(c) safe harbor, the court said that "[e]ven if § 1104(c) does not always shield a fiduciary from an imprudent selection of funds under every circumstance that can be imagined, it does protect a fiduciary that satisfies the criteria of § 1104(c) and includes a sufficient range of options so that the participants have control over the risk of

loss." *Id.* at 589. Thus, because the plan included the mutual fund window that made 2,500 additional mutual funds available, the court found that "[a]ny allegation that these options did not provide the participants with a reasonable opportunity to accomplish the three goals outlined in the regulation, or control the risk of loss from fees is implausible." *Id.*

In the Seventh Circuit's decision denying the petition for rehearing en banc, the court appeared to limit somewhat the breadth of its earlier ruling. *See Hecker v. Deere & Co.*, ___ F.3d ___, 2009 WL 1797441, at *1 (7th Cir. 2009). The court noted the DOL's concern that "our opinion could be read as a sweeping statement that any Plan fiduciary can insulate itself from liability by the simple expedient of including a very large number of investment alternatives in its portfolio and then shifting to the participants the responsibility for choosing among them." *Id.* at *2. The Seventh Circuit disavowed any endorsement of such a result, which could lead to approval of obvious and reckless imprudence in the selection of investments. *Id.* Instead, the court noted that in the complaint, the plaintiffs never alleged that any of the 26 options in the plan, or the 2,500 options offered through the mutual fund window, were unsound or reckless. *Id.* Thus, the court concluded that "*this* complaint, alleging that Deere chose *this* package of funds to offer for its 401(k) Plan participants, with this much variety and this much variation in associated fees, failed to state a claim

upon which relief can be granted." *Id.* (emphasis in original).

As the court made clear in *Hecker*, especially in its order denying rehearing en banc, the facts of that case were quite unique because the plan offered the participants a choice of 2,500 mutual fund options with a wide range of fees. By contrast, however, here the Plan included only forty different mutual funds. Thus, this case does not justify the same broad application of the safe harbor provision as the Seventh Circuit used in *Hecker*.

Instead, because this case involves a possible breach of the duty of loyalty, the better view is that expressed by other courts, and supported by the DOL, that the fiduciaries should not be shielded from liability for offering the participants investment options that are the result of a conflict of interest. *See DiFelice*, 497 F.3d at 418 n.3; *Kanawi*, 590 F. Supp. 2d at 1232. Thus, under these circumstances, the Court finds that the § 1104(c) safe harbor does not apply.

IV. CONCLUSION

For the reasons stated above, Plaintiffs' Motion for Partial Summary Judgment is DENIED. Defendants' Motion for Summary Judgment is GRANTED with regard to all claims except (1) Plaintiffs' prohibited transaction claims arising out of State Street's retention of float, and (2) whether the Defendant fiduciaries breached their duty of loyalty by choosing retail mutual funds in order to maximize the amount

of revenue sharing at the expense of the Plan participants. Plaintiffs are ORDERED to file a supplemental brief further detailing their prohibited transaction claims based on State Street's retention of float. Plaintiffs shall identify with specificity the transactions at issue and which fiduciary was allegedly responsible for such conduct. Plaintiffs' supplemental brief shall not exceed seven (7) pages and shall be filed by noon on July 24, 2009. Defendants shall file a seven page (7) response brief by July 29, 2009. The parties shall not submit any additional evidence but must cite with specificity to the record already before the Court.

IT IS SO ORDERED.

DATED: July 16, 2009 /s/ Stephen V. Wilson
STEPHEN V. WILSON
UNITED STATES
DISTRICT JUDGE

OPPOSITION BRIEF

No. 13-550

IN THE

Supreme Court of the United States

GLENN TIBBLE, ET AL.,

Petitioners,

v.

EDISON INTERNATIONAL, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether ERISA's six-year statute of repose bars plaintiffs' challenges to the selection of certain mutual funds for the Edison 401(k) Plan lineup, where the challenged funds were added to the lineup more than six years before the complaint was filed.

2. Whether the fiduciaries' interpretation of the Plan language is entitled to deference under *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 111 (1989), given the Plan's clear delegation of interpretive authority to the fiduciaries, and where the district court in any event held that the fiduciaries' interpretation was correct on de novo review.

RULE 29.6 STATEMENT

Respondent Edison International is the parent of respondent Southern California Edison Company. Edison International is a publicly traded company and has no corporate parent, and no publicly traded company owns more than 10% of its stock.

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INTRODUCTION

The petition raises two issues under the Employee Retirement Income Security Act ("ERISA"). Neither issue involves a conflict of authority among the courts of appeals. Both issues were carefully considered and correctly decided by the courts below. The petition does not warrant this Court's review.

The first issue involves ERISA's statute of repose, which bars actions filed more than six years after "the date of the last action which constituted a part of the breach or violation." 29 U.S.C. § 1113(1)(A). Petitioners—plaintiffs in the district court—challenge the decision to add certain mutual funds in the Edison 401(k) Plan lineup in 1999, more than six years before they filed their action in 2007. Petitioners argue that the decision to include the challenged funds is subject to challenge in perpetuity, so long as the funds remain in the Plan lineup.

Every circuit to have considered the issue has rejected the "continuing violation" theory petitioners assert. The petition tries to manufacture a circuit conflict on the basis of two decades-old cases, but neither case recognizes anything close to the theory petitioners urge here. To the contrary, both are entirely consistent with the district court and appellate decisions below, which explicitly recognize—like the cited decisions—a fiduciary's duty to monitor *for material changes in circumstances* that require revisiting decisions implemented before the limitations period. Indeed, the district court allowed petitioners a trial to address precisely that issue, and found as a matter of fact that petitioners had failed to identify any materially changed circumstances requiring Edison to revisit its decision to include the challenged

funds in the lineup. Petitioners do not and cannot challenge that factual determination, and the legal question they raise is not subject to any conflict or controversy warranting this Court's intervention.

The second issue raised in the petition is whether the deference normally due under *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 111 (1989), to a fiduciary's reasonable interpretation of plan terms applies outside the context of claims for benefits under ERISA § 502(a)(1)(B). That question is not properly presented here, because the district court specifically found that Edison's interpretation was *correct*, not just reasonable, and thus upheld this interpretation under a de novo standard as well. Petitioners do not and could not challenge that ruling. Petitioners' argument also rests on the incorrect factual premise that Edison's interpretation of the Plan harms participants' interests, and on the incorrect legal premise that the Ninth Circuit's deference ruling conflicts with other circuit decisions. There is no conflict, no legal error, and no reason for further review.

Certiorari should be denied.

STATEMENT OF THE CASE

1. Southern California Edison Company, a California utility company, has for years sponsored a 401(k) savings plan ("the Plan") for its employees and those of affiliated Edison companies (collectively, "Edison"). In the late 1990s, Edison employees' union representatives requested a larger selection of investment options than the six being offered at that time, and in particular a larger selection of retail mutual funds so that employees could easily monitor and diversify their investments. Edison complied in

1999, by increasing the number of institutional investment options and adding forty mutual funds. Thereafter, Edison "regularly reviewed the mutual funds" and removed underperforming investments, and the overall performance of the mutual funds "compared favorably to other benchmarks" over the years. Pet. App. 253-54.

Mutual funds deduct a portion of the value of their underlying assets to pay for various expenses. The percentage of asset value a fund deducts for expenses is reported in the fund's "expense ratio." For example, a fund that sets aside 0.25% of its annual asset value to pay for expenses has an annual expense ratio of 0.25%. Many mutual funds also engage in a practice called "revenue sharing," in which the fund shares part of the revenue reflected in its expense ratio with outside entities that provide administrative services to some of the fund's shareholders. For example, 401(k) plan sponsors typically retain third-party recordkeepers to provide recordkeeping services to all 401(k) plan participants, including investment tracking and participant communications such as prospectuses and monthly statements. Because the provision of those recordkeeping services obviates the need for a mutual fund in the 401(k) plan lineup to provide the same services to the plan participant-investors, the fund may provide revenue sharing to the plan's recordkeeper as compensation for providing those services.

Some of the mutual funds added to the Edison lineup in 1999 provided revenue sharing to the Plan's recordkeeper, Hewitt Associates, LLC ("Hewitt"), which provided various administrative services to Edison Plan participants that the funds would otherwise be required to provide them as fund

investors. Hewitt used the revenue-sharing compensation to defray a portion of its charges to Edison and sent Edison an invoice for the remainder of the administrative costs. Pet. App. 205-06.

As petitioners conceded in the court below, the use of revenue sharing to reduce the Plan's total administrative costs was fully disclosed in the negotiations to expand the Plan offerings. *Id.* at 36. Then, after the Plan offerings were expanded, "on at least seventeen occasions participants were specifically advised that mutual funds were being used to reduce the cost of retaining Hewitt." *Id.* at 45. The employees' bargaining representatives accepted the revenue-sharing arrangement, which imposed no cost on employees. As the district court explained: "[E]ven if Hewitt had not received any portion of the fees from the mutual funds, the individual Plan participant *would have been charged the same fee* for investing with that mutual fund" since a mutual fund is required by law to charge the same fee to all investors in that mutual fund. *Id.* at 206 (emphasis added).

2. In August 2007, petitioners filed suit under ERISA on behalf of a class comprising all members of Edison's eligible workforce. The central contention in the original complaint was that offering *any* retail mutual fund in a plan was imprudent because retirement plans should be limited to institutional funds and the like, but the complaint also included a motley collection of other theories.[1] The district

[1] Petitioners' class counsel made this same claim in numerous cookie-cutter complaints filed against large corporations; not surprisingly, courts have had little trouble rejecting this argument. Pet. App. 53; *see also, e.g.*, *Loomis v. Exelon Corp.*, 658 F.3d 667, 671-72 (7th Cir. 2011).

court granted summary judgment in Edison's favor on almost all claims. *Id.* at 166-268.

The court did allow the case to proceed to a three-day bench trial on limited issues. First, the court heard and rejected petitioners' claim that Edison violated its "duty of loyalty" by adding to the Plan mutual funds with revenue sharing. *Id.* at 68. The court found as a matter of fact that Edison's selections "evidence a pattern that is flatly inconsistent with a desire to capture more favorable revenue sharing arrangements." *Id.* at 123. The "Plan fiduciaries did not," in fact, "make fund selections with an eye toward increasing revenue sharing and did not put the interests of [Edison] above those of the Plan participants." *Id.* at 125.

Second, the court addressed a factual issue relating to ERISA's six-year statute of limitations, which runs from "the date of the last action which constituted a part of the breach or violation." 29 U.S.C. § 1113(1)(A). For funds added to the lineup more than six years before the complaint was filed, the court allowed plaintiffs to try to establish that events occurred during the six-year limitations period that should have compelled Edison to reassess the specific funds offered to the employees. The court found that Edison had monitored the funds throughout the class period with the appropriate level of prudence and that plaintiffs had failed to identify any materially changed circumstances triggering a duty to revisit fund selections. Pet. App. 142-49. The court accordingly held that claims challenging any funds added more than six years before the filing of the complaint were time-barred. *Id.* at 149-50, 180-81.

Petitioners did, however, prevail on a challenge to three mutual funds that *were* added to the Plan lineup within the limitations period—a challenge they first advanced on the eve of trial. *Id.* at 68. As to those three funds, the court held that Edison breached its fiduciary duty by offering only a "retail class" investment in the funds, when a less expensive "institutional class" of the same fund was available. *Id.* at 142. The court emphasized, however, that the share-class offering was an "oversight" that did not rise to the level of bad faith. C.A. Exc. Rec. 22.

3. Petitioners appealed to the Ninth Circuit, which unanimously affirmed. Pet. App. 1-64. As relevant here, the court first affirmed the district court's conclusion that ERISA's six-year statute of limitations bars any claims based on funds added to the Plan more than six years before the filing of the complaint. *Id.* at 17. The court of appeals noted that plaintiffs did not allege any changed circumstances sufficient to trigger a duty to reexamine the merits of the investment, and thus the "last action" for purposes of the statute of limitations was the addition of the funds to the lineup. *Id.* at 17-19. Plan participants had fully six years to challenge the addition of those funds, but after that period the fiduciaries were entitled to repose, unless and until changed circumstances required the fiduciaries to remove the funds. *Id.* Petitioners' contrary view that the limitations period runs forever, the court explained, "would make hash out of" ERISA's statute of repose and would be "unworkable." *Id.* at 17.

Second, the court of appeals rejected petitioners' submission that revenue-sharing arrangements were barred by the terms of the Plan. The court held that

deference to the interpretation of the Plan's fiduciaries was appropriate under *Firestone*: the fiduciaries' interpretation allowing revenue sharing was the "more natural reading" of the Plan language, had been applied consistently, and had been fully and repeatedly disclosed to the employees' union representatives when funds with revenue sharing were added, with no objections heard. *Id.* at 44-45.

Petitioners sought panel and en banc rehearing. The panel modified one section of its opinion and denied rehearing, and en banc rehearing was denied, with no judge calling for a vote. *Id.* at 12.

REASONS FOR DENYING THE PETITION

There is no conflict on either issue presented in the petition, and both issues were resolved correctly by the court of appeals.

I. THE APPLICATION OF ERISA'S SIX-YEAR LIMITATIONS PERIOD DOES NOT WARRANT THIS COURT'S REVIEW

A. There Is No Circuit Conflict

1. The court of appeals held that ERISA's six-year limitations period barred plaintiffs' claims that Edison had breached its duty of prudence in selecting investment options as to any decision made more than six years before the filing of the complaint. Pet. App. 17-19. In so holding, it joined the only other circuit to have squarely considered the issue on materially identical facts. *See David v. Alphin*, 704 F.3d 327, 342-43 (4th Cir. 2013). And both decisions are consistent with ERISA limitations decisions from other circuits, which have uniformly rejected efforts to apply a continuing violation theory to ERISA claims. *See Med. Mut. of Ohio v. k. Amalia Enters.*,

548 F.3d 383, 394 (6th Cir. 2008); *Miller v. Fortis Benefits Ins. Co.*, 475 F.3d 516, 522 (3d Cir. 2007); *Berger v. AXA Network LLC*, 459 F.3d 804, 816 n.16 (7th Cir. 2006); *Edes v. Verizon Commc'ns, Inc.*, 417 F.3d 133, 139 (1st Cir. 2005); *Pisciotta v. Teledyne Indus.*, 91 F.3d 1326, 1332 (9th Cir. 1996); *Adamson v. Armco, Inc.*, 44 F.3d 650, 653-54 (8th Cir. 1995).

2. The two circuit decisions cited by petitioners—*Martin v. Consultants & Administrators, Inc.*, 966 F.2d 1078, 1087-88 (7th Cir. 1992), and *Morrissey v. Curran*, 567 F.2d 546, 548-49 & n.9 (2d Cir. 1977)—do not depart from that consensus. *Morrissey* is not even a limitations decision. And both are entirely consistent with the decisions below.

Petitioners cite *Martin* and *Morrissey* for the unexceptionable proposition that ERISA fiduciaries have a continuing duty to monitor the investments offered. Pet. 17-20. Nobody disagrees. The district court, in fact, applied exactly that principle in holding a trial to allow petitioners "to put on evidence that significant changes in conditions occurred within the limitations period that should have prompted a full diligence review of the funds." Pet. App. 19 (quotation omitted). And while the district court found that petitioners "could not establish changed circumstances engendering a new breach," *id.*; *see id.* at 149, the court of appeals emphasized that it "was entirely correct to have entertained that possibility," *id.* at 19.[2] Neither *Martin* nor *Morrissey* suggests

[2] Petitioners also cite a litany of district court cases (Pet. 19), but they are not relevant under Supreme Court Rule 10, and they generally stand for little more than the uncontested point recognized in *Martin* and *Morrissey*, *viz.*, that ERISA fiduciaries have a continuing duty to monitor the investments offered. *E.g.*, *Leber v. Citigroup, Inc.*, 2011 U.S. Dist. LEXIS

that a different approach was required.

In *Morrissey*, the district court dismissed a case for lack of jurisdiction under ERISA because the allegedly imprudent investment was made before ERISA's effective date. *Morrissey*, 567 F.2d at 547-48. The Second Circuit reasoned that plaintiffs should have at least had the opportunity to present evidence as to whether the plan fiduciaries had a duty to monitor and liquidate the investment, in the face of allegations the investment generated "no return of either income or principal" over a period of several years. *Id.* at 548-49 & n.7. That holding is consistent with both decisions below. As explained, the district court here gave petitioners exactly the opportunity the *Morrissey* plaintiffs had been denied: a trial in which they could present whatever evidence they could muster (after extensive discovery) to establish a new breach within the limitations period. At that trial, the district court examined the evidence concerning Edison's monitoring of investments (e.g., performance net of fees, changes in management, etc.), including evidence offered by plaintiffs in their attempt to show that defendants did not satisfy their ongoing duty to prudently monitor selected investment funds. After reviewing the full record, the district court found that plaintiffs had failed to establish any new material event or cir-

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129444, at *14 (S.D.N.Y. Nov. 8, 2011) ("plan fiduciaries are required to monitor a plan investment 'with reasonable diligence and to withdraw the investment if it bec[omes] clear or should have become clear that the investment [is] no longer proper for the Plan'" (citation omitted) (alterations in original)); *George v. Kraft Foods Global, Inc.*, 814 F. Supp. 2d 832, 852 (N.D. Ill. 2011) (citing *Martin* and *Morrissey* for proposition that failure to review investments "can" constitute a breach).

cumstance within the limitations period that required the Plan fiduciaries to remove the challenged funds. Pet. App. 143-50. Accordingly, as the Ninth Circuit emphasized, the plaintiffs here did not prove a *new breach* within the limitations period. *Id.* at 18-19.

In *Martin*, 966 F.2d at 1082, the complaint alleged that defendants had committed violations based on two entirely different contracts, one awarded in 1984 and the other in 1987. *Id.* at 1087. Because the 1984 contract was outside the limitations period, that claim was barred, and defendants tried to argue that the 1987 contract claim was barred as well, because the bidding procedures for both contracts were similar. *Id.* The court rejected that theory, explaining that the 1987 contract claim was a "distinct violation" involving a new and separate contract and different bidding process. *Id.* at 1087-88. Like *Morrissey*, the holding in *Martin* is entirely consistent with the decisions below, which likewise held that claims based on decisions implemented outside the limitations period were barred, while allowing claims based on new and separate decisions —i.e., the addition of new funds—within the period to proceed. Indeed, as noted above, if petitioners had been able to show that a new breach occurred even as to the funds added before the limitations period, they could have challenged that breach, but petitioners could not make that showing. *See supra* at 5, 8.

Petitioners' challenges to funds added in 1999, in short, failed as *a matter of fact* under a legal rule that is uniformly recognized and applied in federal appellate decisions. There is no legal controversy requiring this Court's intervention.

B. The Court of Appeals' Decision Is Correct

Petitioners are also wrong on the merits. ERISA does not recognize claims that can persist in perpetuity. Just the opposite: ERISA's six-year provision constitutes a statute of repose, *see Radford v. Gen. Dynamics Corp.*, 151 F.3d 396, 400 (5th Cir. 1998), and categorically precludes any claim filed more than six years after "the date of the last action which constituted a part of the breach or violation." 29 U.S.C. § 1113(1)(A). As the court of appeals held, petitioners are challenging "the act of designating an investment for inclusion" in the Plan lineup, an act that was complete before the limitations period commenced. Pet. App. 17.[3]

1. Petitioners argue that even though the three funds they are challenging were added before the limitations period, their claims are timely because Edison did not act to remove them (even absent changed circumstances requiring their removal). As

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[3] Edison argued as an alternate ground of affirmance that ERISA's three-year statute of limitations should apply since plaintiffs "had actual knowledge of the breach or violation" more than three years before they filed suit. 29 U.S.C. § 1113(2). The court of appeals did not reach the issue as to the claims at issue here, because the court found those claims barred under the six-year statute. Pet. App. 20 n.3. The court of appeals rejected the three-year statute of limitations as to the three funds on which petitioners prevailed, *id.* at 20-21, but the three-year statute could still apply to the claims still in issue, since plaintiffs knew, more than three years before they filed suit, that the challenged funds had been added to the lineup, *see Blanton v. Anzalone*, 760 F.2d 989, 992 (9th Cir. 1985) (three-year statute requires only knowledge of underlying facts or transaction constituting alleged violation). Any decision by this Court on the six-year statute thus may be irrelevant to the disposition of the case. *See infra* at 16, 19.

the court of appeals explained, however, that theory "'confuse[s] the failure to *remedy* the alleged breach of an obligation, with the commission of an alleged *second* breach.'" Pet. App. 18 (citation omitted). Put differently, petitioners challenge not an "action" within the limitations period, but *inaction*. *Cf. David*, 704 F.3d at 340 ("Courts have held that a decision to continue certain investments, or a defendant's failure to act, cannot constitute a 'transaction' for purposes of section 406(a) or 406(b)."). Treating "action" to include "inaction" not only perverts the meaning of the word, but would allow claims in perpetuity, thereby rendering the statute of repose "'meaningless.'" Pet. App. 18 (quoting *David v. Alphin*, 817 F. Supp. 2d 764, 777 (W.D.N.C. 2011), *aff'd*, 704 F.3d at 342-43). It also could "expose present Plan fiduciaries to liability for decisions ... which may have been made decades before and as to which institutional memory may no longer exist." *Id.* (quoting *David*, 817 F. Supp. 2d at 777.

Petitioners' theory also ignores the explicit statutory distinction between breaches of commission and breaches of omission. "[I]n the case of omissions the statute already embodies what the beneficiaries urge for the last action. Section 413(1)(B) ties the limitations period to 'the latest date on which the fiduciary could have *cured* the breach or violation.'" *Id.* (emphasis added). To say that a failure to cure a prior breach is equivalent to a new breach would be to render the distinct "omission" language of subparagraph 413(1)(B) "surplusage," *id.*, "which means, of course, that such a reading must be rejected," *FCC v. NextWave Personal Commc'ns Inc.*, 537 U.S. 293, 302

(2003).[4] It also is unreasonable to frame defendants' alleged failure to eliminate investment options in the absence of changed circumstances as "omissions" subject to § 413(1)(B). Permitting such a construction would allow any artful plaintiff to avoid the operation of § 413(1)(A) in any case where § 413(1)(A) should, by its terms, apply.

2. Petitioners also complain that unless a continuing violation theory is recognized, some alleged wrongs could not be rectified. Pet. 20. Petitioners' concern is seriously exaggerated. For one thing, harmful fiduciary decisions generally do not go unnoticed, uncorrected, and unchallenged for fully six years. And even for those that do, a fiduciary still will not have "immunity for all time" (*id.*) for any particular decision, because the fiduciary will be required to revisit the decision whenever "significant changes in conditions" warrant it. Pet. App. 19. Ultimately, even if some small number of injustices "can be imagined," that is *inherently* true in "the application of *any* statute of limitations," *id.* at 18 (emphasis added), and especially for a statute of repose, *see Radford*, 151 F.3d at 400; *Ranke v. Sanofi-Synthelabo Inc.*, 436 F.3d 197, 205 (3d Cir. 2006). As the D.C. Circuit has recognized, ERISA's limitations periods "suggest[] a judgment by Congress that

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[4] Contrary to their suggestion here (Pet. 24-25), petitioners did not adequately preserve below any argument that their claims were governed by the "omission" limitations period set forth in § 413(1)(B)—their principal brief argued the issue in only one half of one sentence. C.A. Dkt. 14, at 24. Their argument from the outset has been that the failure to remove the funds was the "last *action*" under § 413(1)*(A)*. In any event, petitioners cite no circuit decisions treating the conduct alleged here as an omission under § 413(1)(B).

when six years has passed after a breach or violation, and no fraud or concealment occurs, the value of repose will trump other interests, such as a plaintiff's right to seek a remedy." *Larson v. Northrop Corp.*, 21 F.3d 1164, 1172 (D.C. Cir. 1994).

Congress did not enact ERISA to facilitate and promote costly benefit-plan lawsuits, especially stale lawsuits challenging plan decisions made many years earlier. Just the opposite: Congress enacted ERISA to promote plan formation by *reducing* litigation and other administrative expenses. *See Conkright v. Frommert*, 559 U.S. 506, 517 (2010) ("Congress sought to create a system that is not so complex that administrative costs, or litigation expenses, unduly discourage employers from offering ERISA plans in the first place." (quotation and alteration marks omitted)). Adopting plaintiffs' limitations theory would deny plan sponsors and fiduciaries the repose they require to ensure uniform and consistent operation of plans over time. It also would expose plans to the most costly and burdensome kind of litigation, i.e., lawsuits challenging decisions upon which the plan and its beneficiaries have relied for many years. Far from providing meaningful protection against fiduciary breaches, plaintiffs' theory would needlessly increase plan costs and thereby discourage plan formation, undermining ERISA's most important objective.

3. Finally, petitioners contend that the court of appeals erred by not granting deference to the limitations argument asserted by the Department of Labor ("DOL") in an amicus brief below. Pet. 22. But DOL itself *did not seek deference* for its limitations

position. *See* DOL C.A. Amicus Br. 12-19.[5] As DOL's silence indicates, no such deference was due, a point petitioners themselves unwittingly confirm. Their deference argument relies entirely on the so-called "*Auer* deference" standard, Pet. 22 (citing *Auer v. Robbins*, 519 U.S. 452, 462 (1997); *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 171 (2007)), but that standard applies only to an agency amicus brief construing *the agency's own regulations*. *See, e.g., Chase Bank U.S.A., N.A. v. McCoy*, 131 S. Ct. 871, 880 (2011) ("Under *Auer* ... we defer to an agency's interpretation of its own regulation, advanced in a legal brief ...."). Even assuming that standard has continuing vitality, *but cf. Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2168 (2012) (reciting criticisms of *Auer* deference), it has no application to this case, which does not involve any DOL regulation concerning the statute of repose.

II. THE *FIRESTONE* DEFERENCE QUESTION IS NOT PROPERLY PRESENTED AND NOT THE SUBJECT OF ANY CIRCUIT CONFLICT

The second question raised in the petition is whether the court of appeals properly invoked the deferential standard of review prescribed in *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 111 (1989), to Edison's longstanding interpretation of the Plan document language (in Plan § 19.02) addressing payment of Plan administrative costs. That

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[5] By contrast, DOL *did* argue that deference was owed to a DOL regulation—and to DOL's interpretation of that regulation—concerning a completely separate issue not before this Court. DOL C.A. Amicus Br. 24. When DOL wants deference, it knows how to ask.

question is irrelevant here, because the district court applied de novo review and held that Edison's interpretation was correct as a matter of law—a holding that petitioners do not challenge. Deference is thus beside the point. Petitioners' deference argument also rests on a factual premise rejected by both decisions below, neither of which conflicts with any other circuit decision.

A. The Deference Question Is Irrelevant Because Edison's Plan Interpretation Is Correct

If this Court were to grant review, it could not reach the deference question, because Edison's longstanding, fully disclosed interpretation of Plan § 19.02 is correct as a matter of law, which renders the standard of deference irrelevant. *See* S. Shapiro et al., *Supreme Court Practice* 248 (10th ed. 2013) (certiorari inappropriate when Court could "decide the case on another ground").

1. Under *Firestone*, courts give wide deference to a plan fiduciary's interpretation of plan documents, and will uphold any interpretation that is reasonable, so long as the plan confers discretion on the fiduciary to interpret the plan. *Firestone*, 489 U.S. at 111; *see Conkright*, 559 U.S. at 517-18; *Metro. Life Ins. Co. v. Glenn*, 554 U.S. 105 (2008). In this case, there was a brief window at the beginning of the class period when the Plan documents did not grant discretion to Edison to interpret the Plan. Pet. App. 214. The district court accordingly reviewed Edison's interpretation of § 19.02 *both* de novo and for reasonableness under *Firestone*. *Id.* Even under de novo review, the court determined, Edison's interpretation of § 19.02 was correct. *Id.* at 215-17.

Section 19.02 provided that the "cost of the administration of the Plan will be paid by [Edison]." *Id.* at 205 (quotation omitted). The bills submitted by Hewitt for recordkeeping services were a "cost" of plan administration, and Edison paid 100% of those bills. *Id.* at 44. Nothing in the Plan prohibited Hewitt from using revenues it received from third parties, such as mutual funds, to offset its charges and thereby reduce the bills Edison had to pay. *Id.* at 44, 213. As the court of appeals observed, "[t]hat kind of interpretation, nonsensically, would ... imply that if Hewitt had simply lowered its prices (maybe due to efficiency or market pressure) Edison would somehow be shirking its obligation under Plan § 19.02." *Id.* at 44.

The district court also emphasized the extrinsic evidence that overwhelmingly confirmed Edison's interpretation—most importantly, the parties' longstanding mutual acceptance of revenue-sharing under the Plan. *See* Restatement (Second) of Contracts § 202(4) (1981) ("any course of performance accepted or acquiesced in without objection is given great weight in the interpretation of the agreement") (emphasis omitted); *Metro. Area Transit, Inc. v. Nicholson*, 463 F.3d 1256, 1260 (Fed. Cir. 2006) ("the parties' own course of performance is highly relevant to contract interpretation"). When adding funds with revenue sharing was initially considered in 1998 and 1999, Edison had "extensive discussions" with union representatives about the process, and "personally walked" them through exactly how it worked. Pet. App. 215. "The union representatives had no objection to this arrangement." *Id.* Edison subsequently "informed the Plan participants *at least seventeen times* ... that fees from the mutual

funds were being used to reduce Hewitt's recordkeeping costs," again without objection for many years, until this lawsuit was filed. *Id.* (emphasis added).

In addition to the parties' mutual acceptance of the practice, the district court also emphasized that the participants suffered no harm from the practice, because a mutual fund is required to charge the same fees to all investors in the fund, and participants *would not have received the revenue sharing* even if it had not been used to reduce Hewitt's recordkeeping costs. Pet. App. 216. Revenue sharing did not harm participants in any way, and indeed affirmatively benefited them by facilitating the expansion of the Plan's mutual fund offerings, as the court of appeals observed. *Id.* at 44.

For all these reasons, the district court held that, "when applying a de novo review to [Edison's] interpretation of the Plan documents, the Court finds that the interpretation was correct." *Id.* at 217.

2. The court of appeals did not explicitly address that conclusion, but in analyzing the reasonableness of Edison's interpretation under *Firestone*'s deferential standard, the court strongly signaled its agreement that Edison's reading was correct. Edison's construction of the Plan language is the "more natural" and "commonsense" reading, the court observed, while dismissing petitioners' reading as "nonsensical[]." *Id.* at 44. The Ninth Circuit also found Edison's interpretation to be "most consistent with the goals of the plan," because it "facilitated the expansion of the Plan's mutual fund offerings," and the court emphasized that Edison's interpretation "has been applied consistently over time." *Id.*

3. The petition for a writ of certiorari does not expressly challenge the district court's holding that Edison's interpretation of the Plan was correct on de novo review. Nor does the petition address the lower courts' analysis of the Plan language and the undisputed extrinsic evidence. The petition instead merely asks this Court to rule that "*Firestone* deference does not apply in this case." Pet. 38. It plainly does, *see infra* at 21-24, but even if it did not, the case still would be controlled by the district court's unchallenged and unassailable ruling that Edison followed the correct interpretation of Plan § 19.02. There is no reason for this Court to consider whether deference properly applies in this case, because the answer to that question "could not change the result reached below." *Supreme Court Practice*, *supra*, at 249.

B. Petitioners' Deference Question Is Premised On A Fundamental Misstatement Of Fact

Petitioners' deference question is also premised on a fundamental misstatement of fact. According to petitioners, a court should not defer to Edison's interpretation of Plan § 19.02 because that interpretation allowed Edison "to shift some of the cost of administering the Plan to the participants through revenue sharing." Pet. 27; *id.* at Pet. ii (stating Question Presented as whether deference applies to an interpretation that "came at the expense of plan participants").

That premise is incorrect: the revenue-sharing arrangements did *not* shift any costs to Plan participants, as the district court specifically found. Pet. App. 216. When a 401(k) plan purchases shares in a

mutual fund on behalf of a plan participant, the *shares* become a plan asset, but the *underlying assets* of the mutual fund do not. *See* 29 U.S.C. § 1101(b)(1). And revenue sharing comes from the fund's own underlying assets—specifically, the *fixed amount* of those assets (reflected in percentage terms by the "expense ratio") that is segregated to cover the fund's own expenses. Revenue sharing, in other words, comes entirely out of assets belonging to the mutual fund company—not from assets that belong to the Plan or participants in any respect. *See Hecker v. Deere & Co.*, 556 F.3d 575, 584-85 (7th Cir. 2009). And if a given fund company decides to share a portion of its revenues reflected in the expense ratio with other parties, the ratio remains the same for all fund investors. Accordingly, a fund's decision to share its revenues with a 401(k) recordkeeper like Hewitt—which provides services that reduce the fund's own expenses—does not cause a participant investing in the fund to incur higher fees.

When the recordkeeper receives compensation for its services from the mutual fund company, it obviously allows the recordkeeper to reduce its own charges to the plan sponsor, which is exactly what happened here. That benefit to Edison, however, did not in any sense come "at the expense of plan participants" (Pet. ii), for the reasons just explained. To the contrary, Edison's lower costs were plainly a benefit to Plan participants as well, because they "facilitated the expansion of the Plan's mutual fund offerings." Pet. App. 44. There is a reason, after all, that the employees' union representatives did not object to the revenue-sharing arrangements when they were described in connection with the new lineup in 1998 and 1999. *Supra* at 4, 17-18.

In short, this case does not present the question whether *Firestone* deference should apply to a fiduciary's plan interpretation that benefits the plan sponsor at the participants' expense. Edison's interpretation of Plan § 19.02 did not shift any costs of Plan administration to participants.

C. The Decision Below Correctly Invokes *Firestone* Deference And Does Not Conflict With Any Other Circuit Decision

Petitioners argue that *Firestone* deference does not apply here because it is "limited to benefit-claims cases" under ERISA § 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B), Pet. 29, citing Second and Third Circuit cases ostensibly endorsing that position. Petitioners are wrong. Neither case holds that *Firestone* deference is inapplicable where, as here, the fiduciary decision being challenged is a discretionary interpretation of the plan terms, and the interpretation does not result in unlawful conduct or otherwise harm the interests of plan participants.

1. Several circuits have expressly recognized that *Firestone* deference is not limited to benefit-claim cases under § 502(a)(1)(B). *See* Pet. App. 38-43; *Hunter v. Caliber Sys.*, 220 F.3d 702, 711 (6th Cir. 2000); *In re Unisys Sav. Plan Litig.*, 173 F.3d 145, 155 (3d Cir. 1999); *Mahoney v. Bd. of Trs.*, 973 F.2d 968, 971 (1st Cir. 1992). As the decision below explains, that conclusion follows directly from *Firestone*'s own logic, which emphasizes that the trust-law principles that compel deference pervade ERISA in general, not just one provision, and that deference in any context promotes ERISA's objectives of uniformity and reducing litigation costs. Pet. App. 42-43. The Supreme Court strongly reaffirmed those

principles in *Conkright*:

> Deference promotes efficiency by encouraging resolution of benefits disputes through internal administrative proceedings rather than costly litigation. It also promotes predictability, as an employer can rely on the expertise of the plan administrator rather than worry about unexpected and inaccurate plan interpretations that might result from *de novo* judicial review. Moreover, *Firestone* deference serves the interest of uniformity, helping to avoid a patchwork of different interpretations of a plan, like the one here, that covers employees in different jurisdictions—a result that would introduce considerable inefficiencies in benefit program operation, which might lead those employers with existing plans to reduce benefits, and those without such plans to refrain from adopting them.

559 U.S. at 517 (quotation omitted).

2. Despite the central role deference plays in advancing ERISA's core objectives, petitioners say (Pet. 29) it is limited solely to benefit-claim cases under § 502(a)(1)(B), citing two pre-*Conkright* decisions from the Second and Third Circuits—*John Blair Communications, Inc. Profit Sharing Plan v. Telemundo Group, Inc. Profit Sharing Plan*, 26 F.3d 360, 368-69 (2d Cir. 1994), and *Unisys*, 173 F.3d at 154-55. Neither decision supports the elimination of deference in the circumstances of this case.

In *Unisys*, the Third Circuit explained (in what amounts to extended dicta) that *Firestone* deference does not apply to all ERISA claims outside the benefit-denial context, but the court explicitly stated that

it *does* apply to *any discretionary plan interpretation*, regardless whether the claim asserts a denial of benefits. *See* 173 F.3d at 155 ("[O]nly when the plan gives the trustee discretion to deny benefits or construe the terms of the plan should a court employ the arbitrary and capricious standard. As the instant case does not concern a denial of benefits under 29 U.S.C. § 1332(a)(1)(B) or an interpretation of Unisys's Plan, *Firestone*'s standard is inapplicable." (emphasis omitted)). Unlike the claim in *Unisys*—which asserted that the fiduciary made imprudent investment selections for the 401(k) plan lineup—the claim at issue here "rises or falls exclusively on what Plan section 19.02 allows." Pet. App. 41. Under *Unisys*, deference applies to Edison's longstanding interpretation of what § 19.02 allows.

The Second Circuit's decision in *John Blair* is distinguishable for a related reason, as the Ninth Circuit expressly recognized. Pet. App. 40-41. In *John Blair*, the fiduciary had allegedly adopted a plan interpretation that violated ERISA's duty of loyalty under § 404(a)(1)(B). 26 F.3d at 368-69. In this case, by contrast, petitioners assert that Edison violated *only* the distinct requirement under § 404(a)(1)(D) that the fiduciary's "actions be in line with the plan documents." Pet. App. 40. In other words, in *John Blair*, if the fiduciary's interpretation of the plan was correct, then the plan authorized conduct prohibited by ERISA; whereas here, if Edison's interpretation of the Plan is correct, then the Plan authorizes conduct—revenue sharing—that is perfectly lawful under ERISA.[6] For that reason, the

[6] DOL regulations authorize revenue-sharing with disclosure to the plan sponsor. 75 Fed. Reg. 64,910, 64,913-14 (Oct. 20, 2010), codified at 29 C.F.R. § 2550.404a-5(c)(2)(ii)(C).

Ninth Circuit explained that it could "leave for another day what judicial review standard would apply in a case like *John Blair* where the plan is said to authorize what the statutory duties in ERISA forbid." Pet. App. 41 n.17. This Court, too, can leave the same question for another day—if and when the circuits actually issue conflicting decisions on its answer.[7]

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

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[7] There is little likelihood, however, that a live conflict will ever materialize on that question, because this Court's decision in *Conkright* effectively answers it. *Conkright* rejects *John Blair*'s premise that *Firestone* is subject to ad hoc exceptions depending on as little as which ERISA provision the plaintiff cites in his complaint. According to *Conkright*, *Firestone* establishes "a broad standard of deference without any suggestion that the standard was susceptible to ad hoc exceptions." 559 U.S. at 513. *Conkright* also recognizes that making special exceptions to *Firestone* deference would be equally contrary to *Metropolitan Life Insurance Co. v. Glenn*, 554 U.S. 105 (2008), which rejected another ad hoc exception essentially on the ground "that ERISA law was already complicated enough without adding 'special procedural or evidentiary rules' to the mix." *Conkright*, 559 U.S. at 513 (quoting *Glenn*, 554 U.S. at 116). *John Blair* represents just the sort of ad hoc exception to *Firestone* deference that was rejected in *Conkright* and *Glenn*.

Respectfully submitted,

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REPLY BRIEF

No. 13-550

In The
Supreme Court of the United States

GLENN TIBBLE, et al.;

Petitioners,

v.

EDISON INTERNATIONAL, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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I. Respondents' interpretation of §1113(1) contradicts the "continuing duty" principle recognized in the Seventh and Second Circuits and the terms of the statute.

Martin v. Consultants & Administrators, Inc., 966 F.2d 1078 (7th Cir. 1992), and *Morrissey v. Curran*, 567 F.2d 546 (2d Cir. 1977), recognize the principle underlying ERISA that §1104(a)(1) imposes a "continuing fiduciary duty" "to review plan investments and eliminate imprudent ones", *Consultants*, 966 F.2d at 1087–88, and "to dispose of improper investments within a reasonable time", *Morrissey*, 567 F.2d at 548–49 and n.9. Section 1113(1) incorporates this principle of a continuing fiduciary duty by delaying the start of the limitations period until the last action constituting part of the breach or the latest date on which an omission could have been cured. Respondents' and the Ninth Circuit's interpretation to start the period from the first date imprudent funds were put into a plan is irreconcilable with the continuing duty principle recognized by the Second and Seventh Circuits and most other district courts and the Secretary of Labor.[1]

Neither *Consultants* nor *Morrissey* suggest, as the Ninth Circuit held and Respondents contend, that ongoing fiduciary duties apply only when there are

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[1] Respondents dispute only whether *deference* to the Secretary's position was required, Opp. 14–15, but do not dispute that the decision below conflicts with the Secretary's interpretation of §1113(1) in this and other cases. Pet. 21–23.

"significant changes in conditions[.]" Opp. 7–8. The time-barred mutual funds were indisputably "improper" or "imprudent investments", as shown by the judgment for Petitioners on identical claims regarding the three more recently selected funds. Pet. App. 60–64. In the Seventh and Second Circuits, Respondents' failure to eliminate those improper investments within a reasonable time—i.e., at any time within the six years preceding the complaint—would be an actionable fiduciary breach. The decision below eviscerates the continuing fiduciary duty recognized by the Seventh and Second Circuits, and its conclusion that ongoing duties are triggered only in cases of "changed circumstances" has not been adopted by any other circuit decision.[2]

Respondents further contend that the Ninth Circuit's holding is consistent with other circuit decisions rejecting application of a "continuing violations theory" to ERISA claims. Opp. 7–8. Their cases do not even concern §1113. *Medical Mutual of Ohio v. k. Amalia Enterprises*, 548 F.3d 383, 391 & n.5 (6th Cir. 2008), addressed a contractual limitations period, not §1113. *Miller v. Fortis Benefits Insurance Co.*, 475 F.3d 516, 520 & n.2 (3d Cir. 2007), and *Adamson v. Armco, Inc.*, 44 F.3d 650, 653 (8th Cir. 1995), involved

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[2] The Fourth Circuit expressly did not address "whether ERISA fiduciaries have an ongoing duty to remove imprudent investment options in the absence of a material change in circumstances[.]" *David v. Alphin*, 704 F.3d 327, 341–42 (4th Cir. 2013).

claims for benefits under 29 U.S.C. §1132(a)(1)(B), to which §1113 does not apply. *Heimeshoff v. Hartford Life & Accident Ins. Co.*, 571 U.S. ___, 134 S. Ct. 604, 610, 616 (2013). Similarly, *Berger v. AXA Network LLC*, 459 F.3d 804, 808–09 (7th Cir. 2006), and *Edes v. Verizon Communications, Inc.*, 417 F.3d 133, 139 (1st Cir. 2005), involved employee misclassification claims under 29 U.S.C. §1140, which also borrows a State limitations period.[3] *Pisciotta v. Teledyne Industries*, 91 F.3d 1326 (9th Cir. 1996) (per curiam), concerns a borrowed four-year State limitations statute, not §1113. *Id.* at 1332 (citing *Northern Retail Clerks Unions v. Jumbo Markets, Inc.*, 906 F.2d 1371, 1372 (9th Cir. 1990)).

Because those cases involved State limitations statutes that are unlike §1113(1), their discussion of equitable tolling based on "continuing violations" does not support the Ninth Circuit's or Respondents' interpretation of §1113(1). Because §1113(1) expressly provides that the limitations period does not begin to run until the *last* action or omission that is part of the breach, there is no need to resort to equitable tolling doctrines to conclude that the subject claims were timely.

Respondents insist that §1113(1) is a pure "statute of repose" that "categorically precludes" any

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[3] The plaintiffs in *Berger* and *Edes* had not even alleged any continuing wrongs. *Berger*, 459 F.3d at 816 n.16; *Edes*, 417 F.3d at 139.

challenge to an investment fund six years after it is selected for inclusion in a retirement plan. Opp. 1, 11. Because §1113(1) measures timeliness from the last action constituting part of the breach, it provides "repose" only to a limited extent. In contrast to the "last action" feature of §1113(1), a true "statute of repose" starts from the date of a single event. See *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 359–60 and nn. 5–7 (1991) (securities fraud repose periods); 28 U.S.C. §1658(b)(2).[4] A pure statute of repose would commence the limitations period from the *first* action constituting a part of the breach, assuring fiduciaries they could no longer be liable so long as their course of fiduciary misconduct continued past six years without action.[5] Instead, §1113(1) recognizes that ERISA's fiduciary duties are of a continuing nature and thus starts the limitation period on the *last* of the actions or omissions that are part of the breach. Because ERISA is a

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[4] "Notwithstanding subsection (a), a private right of action that involves a claim of fraud, deceit, manipulation, or contrivance in contravention of a regulatory requirement concerning the securities laws, as defined in section 3(a)(47) of the Securities Exchange Act of 1934, may be brought not later than the earlier of—

(1) 2 years after the discovery of the facts constituting the violation; or

(2) 5 years after such violation."

[5] That is what §1113(2) does in cases of actual knowledge of a fiduciary breach, providing only "3 years after the *earliest date* on which the plaintiff had actual knowledge of the breach or violation[.]" 29 U.S.C. §1113(2) (emphasis added); see Pet. 3–4.

reticulated statute and "the product of a decade of congressional study", courts should be "especially 'reluctant to tamper with [its] enforcement scheme[.]'" *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 209 (2002) (citations omitted). Respondents and the Ninth Circuit tamper with ERISA's enforcement scheme by excising the plain continuing duty principle incorporated in §1113(1) in their attempts to contort §1113(1) into a statute of repose.

The cases Respondents cite in support of their repose theory are inapposite. *Radford v. Gen. Dynamics Corp.* addressed only whether the actual knowledge, three-year limitation period is tolled pending the exhaustion of administrative remedies. 151 F.3d 396, 400 (5th Cir. 1998). *Ranke v. Sanofi-Synthelabo Inc.* addressed only whether actual knowledge of a breach was required to trigger the six-year limitations period. 436 F.3d 197, 201–05 (3d Cir. 2006). In *Larson v. Northrop Corp.*, an employer purchased an annuity upon the termination of a pension plan, which a participant claimed was a breach of fiduciary duty. 21 F.3d 1164, 1165, 1169 (D.C. Cir. 1994). The participant had six years from the termination of the plan to bring his action because all fiduciary duties ended with the termination of the plan. The last fiduciary action constituting part of the breach was the last date any fiduciary duties were owed—the plan termination date. *Id.* Thus, the foundation for the holding was the absence of any ongoing fiduciary duty—the exact *opposite* of what this case presents. Here, Respondents owed continuing fiduciary duties

to review the Plan's investments, and were not entitled to shirk those ongoing duties merely because the funds were first selected over six years earlier.

Respondents also rely on the mistaken premise that Petitioners challenge only "the act of designating" the mutual funds for inclusion in the Plan in 1999, and mischaracterize Petitioners' argument as seeking to challenge that decision "in perpetuity[.]" Opp. 1, 11.[6] The initial decision to use the higher cost shares is certainly a breach, as found by the district court. However, the ongoing actions of rejecting use of a lower cost share class and repeated omissions to even evaluate how using higher-cost shares of the exact same investment could possibly be prudent are further breaches that occurred within the six-year period. Respondents contend that it would be unfair to treat their "inaction" during the limitations period in "fail[ing] to remedy" the 1999 breach as the relevant "action" or "omission" under §1113(1). Opp. 12–13. But the basis of Respondents' liability at trial for the mutual funds added within the limitations period *was* inaction or omission—"fail[ing] to investigate the possibility of institutional share-class alternatives." App. 60–61. Respondents' breach was not limited merely to the act of including retail-class shares.

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[6] In fact, the only thing that may occur "in perpetuity" if the decision below stands is that plan fiduciaries will receive perpetual immunity for unquestionably imprudent funds that remain in this plan and others so long as the funds were first selected over six years earlier. Pet. i, 20, 23.

Id. Indeed, under the plain language of the statute, a breach of the duty of prudence invariably involves some form of "inaction" or "omission", i.e., a failure to act with the requisite "care, skill, prudence, and diligence", see 29 U.S.C. §1104(a)(1)(B).

Here, Respondents failed to investigate the availability of institutional shares in 1999. While that breach was beyond the six-year limitation (and hence not "subject to challenge in perpetuity" as Respondents contend), it was Respondents' conduct within the limitations period in failing to review and replace the higher cost shares which constituted further breaches. See *Lewis v. City of Chicago*, 560 U.S. 205, 214–17 (2010) (Title VII claim based on "present violation" within limitations period was timely even though initial decision to adopt unlawful policy occurred before limitations period). Respondents could have cured their breach at any time during the limitations period of August 16, 2001 through August 16, 2007 simply by reviewing a prospectus and calling the fund managers.[7] See Pet. App. 137, 139–41; cf. *id.*

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[7] Respondents erroneously suggest that no circuit authority would "treat the conduct alleged here as an omission" under §1113(1)(B). Opp. 13 n.4. In *Librizzi v. Children's Memorial Medical Center*, 134 F.3d 1302, 1307 (7th Cir. 1998), the court noted that an omission could be "cure[d]" within the meaning of §1113(1)(B) if it could be "fix[ed]", as distinguished from a "'remedy' in the sense of 'damages for what can no longer be fixed[.]'" Respondents could have "cured" or "fixed" their omission in failing to investigate the availability of institutional shares by doing so within the statutory period and replacing the

131–32 (discussing instance when Respondents did so as to a later-selected fund and transferred to institutional shares).

But whether the breach is more properly characterized as one of commission or omission is ultimately beside the point. Congress provided that under *either* scenario, a participant may bring an action within six years of the "last" or "latest" relevant date. 29 U.S.C. §1113(1). The proper interpretation of that statute is critical to the ability of American workers to protect their retirement security.[8] Pet. 5–6. The petition should be granted.

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higher cost options. That is "fixing" their omission as opposed to merely providing a "remedy" for their omission. *Id.*

[8] Although Respondents attempt to belittle this case as a "motley collection" of claims and "cookie-cutter" litigation, Opp. 4 & n.1, industry experts have recognized that this and similar cases have caused plan fiduciaries to "focus attention on costs", resulting in significant reductions in the fees that workers are charged to participate in 401(k) plans. Tara Siegel Bernard, *Limiting the 401(k) Finder's Fee*, N.Y. TIMES, June 21, 2013, at B1 (http://www.nytimes.com/2013/06/22/your-money/driving-down-the-cost-of-investing-for-retirement.html); Linda Stern, *Stern Advice—How 401(k) Lawsuits are Bolstering Your Retirement Plan*, REUTERS, Nov. 5, 2013 ("fees have been coming down for years" and "are likely to keep falling" as a result of 401(k) plan litigation) (http://www.reuters.com/article/2013/11/05/column-stern-advice-idUSL2N0IP18G20131105).

II. The deference question is properly presented and the circuit conflict well-defined.

Respondents do not seriously dispute the existence of a circuit split as to whether *Firestone* deference applies to fiduciary breach actions under 29 U.S.C. §1132(a)(2). Instead, Respondents contend that the issue is irrelevant because the district court found that Respondents correctly interpreted the Plan even under a *de novo* standard. Opp. 16–19. Respondents also rely on the fiction that causing Plan participants to pay $8 million in administrative costs did not "harm" them. *Id.* 19–21. Neither argument has merit.

As to the district court's *de novo* interpretation, the Ninth Circuit did not address that conclusion, as Respondents concede. Opp. 18. Had the Ninth Circuit agreed with the district court's *de novo* interpretation, it would not have even needed to reach the deference question or to stretch *Firestone* beyond its limits to apply to a fiduciary breach action. Given that the Ninth Circuit explicitly created a conflict with the Second Circuit on the deference issue (711 F.3d 1061, 1077–78), and then went so far as to amend its opinion on that point after Petitioners pointed out the errors in its analysis (Pet. App. 6–12), the Ninth Circuit evidently found the district court's *de novo* interpretation not worthy of affirmance. Thus, the legal question of whether *Firestone* deference applies

to fiduciary breach actions is properly presented,[9] and the Court can leave the issue of the district court's *de novo* interpretation for the Ninth Circuit to resolve on remand. *Zivotofsky v. Clinton*, 566 U.S. ___, 132 S. Ct. 1421, 1430–31 (2012) (when the Court "reverse[s] on a threshold question, [it] typically remand[s] for resolution of any claims the lower courts' error prevented them from addressing") (citing *Bond v. United States*, 564 U.S. ___, 131 S. Ct. 2355, 2360 (2011)).

Respondents' contention that participants were not harmed in any way by paying $8 million in fees that the Plan required Edison to pay is absurd. Cf. Opp. 19–20. Again, Respondents rely on the district court's conclusion to that effect, another point not addressed by the Ninth Circuit. *Id.* 19. It is irrelevant that a mutual fund is obligated to charge the same fee to all investors. Cf. *id.* 18. As shown in the judgment against Respondents in this case, Respondents could and should have chosen institutional share

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[9] Respondents' attempt to bolster the district court's *de novo* interpretation is thus irrelevant. Cf. Opp. 17–18. It also is erroneous. There was no need to resort to extrinsic evidence because the meaning of §19.02 was unambiguous and clearly obligated Edison, not the participants, to pay the costs of plan administration. *Tanadgusix Corp. v. Huber*, 404 F.3d 1201, 1205 (9th Cir. 2005) ("The terms of the contract control, regardless of the parties' subjective intentions shown by extrinsic evidence."). And the "seventeen" disclosures in summary plan descriptions and similar documents (Pet. App. 45, 215), cannot trump the actual terms of the Plan. *CIGNA Corp. v. Amara*, 563 U.S. ___, 131 S. Ct. 1866, 1877–78 (2011).

classes that were identical in all respects except for lower costs.[10] This would have reduced the cost to participants for investing in the same mutual fund, albeit at a higher cost to Edison for costs of administration.

Moreover, even for funds that paid revenue sharing, Respondents could have demanded that Hewitt rebate those amounts to the Plan while Edison paid the full cost of administration as the Plan document required. Respondents cannot explain how their interpretation of the Plan and decision to accept the offsets—thereby benefiting themselves—was in the interest of the participants, as opposed to Edison. Cf. 29 U.S.C. §1104(a)(1) (fiduciaries must act "solely in the interest of the participants"). Thus, regardless of whether revenue sharing of mutual fund fees is a "plan asset", the economic reality is that Respondents' interpretation of Plan §19.02 caused participants to pay $8 million that Edison was obligated to pay.[11]

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[10] Seemingly small differences in fees will have a dramatic impact on retirement assets over the course of a worker's career. See, e.g., Matthew O'Brien, *The Crushingly Expensive Mistake Killing Your Retirement*, THE ATLANTIC, Feb. 15, 2014 (illustrating how unnecessary fees reduce average 401(k) participant's lifetime savings by $159,000) (http://www.theatlantic.com/business/archive/2014/02/the-crushingly-expensive-mistake-killing-your-retirement/283866/).

[11] As the DOL recently noted, "[r]egardless of whether the revenue sharing payments are plan assets", ERISA fiduciaries must still account for the payments in order to assess the reasonableness of a service provider's compensation. DOL Advisory

Respondents' use of certain mutual fund share classes to reduce Edison's cost of administration at the expense of participants is indefensible.

Respondents erroneously claim several circuits have "expressly recognized that *Firestone* deference is not limited to benefits cases" and thereby suggest that circuits other than the Ninth have extended *Firestone* to fiduciary breach actions. Opp. 21. *Hunter v. Caliber Systems, Inc.*, concerned ERISA's anti-cutback provision (29 U.S.C. §1054(g)),[12] which is not part of ERISA's "Fiduciary Responsibility" provisions. 220 F.3d 702, 710–11 (6th Cir. 2000). As *Hunter* recognized, that §1054(g) claim "was brought under § 1132(a)(1)(B)" and thus "*is* about benefits[.]" *Id.* at 711. The cases it cites as "prior decisions applying the arbitrary and capricious standard outside of the benefits denial context" (*id.*) were in fact benefits claims, albeit arising under 29 U.S.C. §1053(a) (*Whisman v. Robbins*, 55 F.3d 1140 (6th Cir. 1995)), or a claimed wrongful "denial of his benefits . . based upon an impermissible amendment to the Plan" (*Leahy v. Trans Jones, Inc.*, 996 F.2d 136, 140 (6th Cir. 1993)). *Mahoney v. Board of Trustees*, concerned a multi-employer plan and the limited question presented by the appellants of whether the fact that union-selected trustees benefited from the trustees' distribution of a plan surplus merited "an especially strict standard of

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Opinion 2013-03A (July 3, 2013) (available at: http://www.dol.gov/ebsa/pdf/AO2013-03A.pdf).

[12] ERISA §204(g).

review" instead of what appellants conceded should be deferential review. 973 F.2d 968, 970 (1st Cir. 1982). Therefore, Respondents' and the Ninth Circuit's application of *Firestone* to the facts of this case is novel, conflicts with the Second and Third Circuits, and has very damaging consequences to the retirement security of tens of millions of employees, which compels this Court's attention as Petitioners have requested.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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AMICUS CURIAE BRIEF

No. 13-550

In the Supreme Court of the United States

GLENN TIBBLE, ET AL., PETITIONERS

v.

EDISON INTERNATIONAL, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

The Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1001 *et seq.*, imposes duties on fiduciaries of an employee benefit plan to administer the plan prudently, for the exclusive benefit of the participants, and in accordance with the provisions of the plan. 29 U.S.C. 1104(a). Plan participants and beneficiaries may sue on behalf of the plan to remedy a breach of these fiduciary duties. 29 U.S.C. 1109, 1132(a)(2). A claim for breach of fiduciary duty must be brought within six years of "(A) the date of the last action which constituted a part of the breach or violation, or (B) in the case of an omission the latest date on which the fiduciary could have cured the breach or violation," 29 U.S.C. 1113(1), unless the plaintiff had actual knowledge of the breach, 29 U.S.C. 1113(2), or there was fraud or concealment of the breach, 29 U.S.C. 1113.

The questions presented are:

1. Whether a claim that ERISA plan fiduciaries breached their duty of prudence by offering higher-cost retail-class mutual funds to plan participants, even though identical lower-cost institutional-class mutual funds were available, is barred by 29 U.S.C. 1113(1) when fiduciaries initially chose the higher-cost mutual funds as plan investments more than six years before the claim was filed.

2. Whether, in the context of a claim that plan fiduciaries breached their duty to administer an ERISA plan in accordance with plan terms, the fiduciaries' interpretation of the plan is reviewed for an abuse of discretion or de novo when the plan expressly gives the fiduciaries discretion to interpret the plan.

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the order of this Court inviting the Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be granted, limited to the first question presented.

STATEMENT

1. The Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1001 *et seq.*, "protect[s] * * * the interests of participants in employee benefit plans and their beneficiaries" by "establishing standards of conduct, responsibility, and obligation for fiduciaries of [those] plans." 29 U.S.C. 1001(b). ERISA imposes the trust-law duties of loyalty and prudence on plan fiduciaries. 29 U.S.C. 1104(a)(1); see *Varity Corp.* v. *Howe*, 516 U.S. 489, 496 (1996). Thus, plan fiduciaries must act "solely in the interest of the participants and beneficiaries" and "for the exclusive

purpose" of providing benefits and defraying plan expenses. 29 U.S.C. 1104(a)(1)(A). Plan fiduciaries also must discharge their responsibilities "with the care, skill, prudence, and diligence" that a prudent person "acting in a like capacity and familiar with such matters" would use. 29 U.S.C. 1104(a)(1)(B). Further, plan fiduciaries must act "in accordance with the documents and instruments governing the plan," so long as they are consistent with ERISA. 29 U.S.C. 1104(a)(1)(D).

A plan participant or beneficiary may sue on behalf of the plan to remedy a breach of fiduciary duty, 29 U.S.C. 1132(a)(2), and fiduciaries are personally liable for such breaches, 29 U.S.C. 1109. With exceptions not applicable here (see note 3, *infra*), an action for breach of fiduciary duty must be brought within six years of "(A) the date of the last action which constituted a part of the breach or violation, or (B) in the case of an omission the latest date on which the fiduciary could have cured the breach or violation." 29 U.S.C. 1113(1).

In *Firestone Tire & Rubber Co.* v. *Bruch*, 489 U.S. 101 (1989), this Court held that review of a plan administrator's denial of ERISA plan benefits is de novo unless "the benefit plan gives the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan," in which case abuse-of-discretion review applies. *Id.* at 115. The Court added that if the plan administrator "is operating under a conflict of interest," that conflict should be "weighed as a 'facto[r] in determining whether there is an abuse of discretion.'" *Ibid.* (citation and internal quotation marks omitted; brackets in original). The Court reaffirmed that standard in *Met-*

ropolitan Life Insurance Co. v. *Glenn*, 554 U.S. 105 (2008), and *Conkright* v. *Frommert*, 559 U.S. 506 (2010).

2. Respondent Edison International is a holding company for electric utilities and energy interests (collectively, Edison). Pet. App. 13. Petitioners are participants in the Edison 401(k) plan (the Plan). *Id.* at 12-13, 70. The Plan is a multi-billion-dollar ERISA plan serving approximately 20,000 employees. *Id.* at 13, 105. Respondent Southern California Edison Benefits Committee (Benefits Committee) is the plan administrator, and respondents Edison International Trust Investment Committee and Trust Investment Subcommittee (collectively, the Investment Committees) choose plan investments. *Id.* at 169-170.

a. The Plan is a defined-contribution plan, meaning that participants are entitled to the value of their own investment accounts, rather than any specific benefit amount. Pet. App. 13; see 29 U.S.C. 1002(34). The value of each participant's account depends upon the participant's and employer's contributions and the investments' market performance, minus expenses. Pet. App. 13.

Participants choose their investments from a menu of funds selected by the Investment Committees. Pet. App. 72-73. The Investment Committees meet quarterly to review plan investments, and at those meetings, they consider whether to remove, replace, or add funds. *Id.* at 74-75; see Defs.' Corrected Statement of Uncontroverted Facts 16 (¶ 65) (D. Ct. Doc. 264) (Statement of Uncontroverted Facts).

Since 1999, plan participants could choose from a variety of funds, including approximately 40 mutual funds. Pet. App. 13-14. For six mutual funds, the

Investment Committees selected retail-class funds as plan investments, even though otherwise identical institutional-class funds that charged lower fees were available. *Id.* at 14, 83-84. The mutual funds also engaged in a practice called "revenue sharing," under which a portion of the fees collected by the mutual funds from investors was distributed to service providers, such as the Plan's recordkeeper. *Id.* at 14, 80. The revenue-sharing practice allowed Edison to pay less to the recordkeeper for its services to the Plan because the recordkeeper credited Edison for the amounts it received from the funds. *Id.* at 36.

Two plan terms are at issue here. The first provides that "[t]he cost of the administration of the Plan will be paid by the Company." Pet. App. 36.[1] The second gives the Benefits Committee "full discretion to construe and interpret the terms and provisions of this Plan." *Id.* at 211.

b. Petitioners sued Edison, the Benefits Committee, the Investment Committees, and others (respondents in this Court), alleging breach of fiduciary duties. Pet. App. 65-67. As relevant here, petitioners contended that respondents (1) breached their duty of prudence by offering higher-fee retail-class mutual funds as plan investments when identical lower-fee institutional-class funds were available, and (2) breached their duty of administering the Plan in accordance with its terms by using the revenue-sharing arrangement to reduce Edison's costs, which petitioners contended effectively shifted those costs to participants. *Id.* at 65-68.

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[1] The Plan was amended in 2006 to state that the company must pay plan administration costs, "net of any adjustments by service providers." Pet. App. 37 (emphasis omitted).

c. The district court granted partial summary judgment to respondents. Pet. App. 166-268. The court held that ERISA's six-year statute of limitations barred claims arising from respondents' retention of mutual funds that were first selected as plan investments more than six years before the complaint was filed, on the ground that "[t]here is no 'continuing violation' theory" under ERISA. *Id.* at 180, 262-263. The court also rejected petitioners' claim that the revenue-sharing arrangement violated the plan term requiring the company to pay the cost of plan administration. *Id.* at 209-219. The court reviewed respondents' interpretation of that plan term for abuse of discretion because the Plan "unambiguously gives the Benefits Committee discretion to interpret the language of the Plan." *Id.* at 211. The court determined that respondents' interpretation of "cost of administration of the Plan" to mean net costs was not an abuse of discretion, *id.* at 213, and indeed "was correct" under de novo review, *id.* at 215-217.[2]

d. After a bench trial, the district court held that respondents breached their duty of prudence by offering retail-class mutual funds as plan investments when identical lower-cost institutional funds were available. Pet. App. 68-69, 128-142. But the court limited that holding to the three mutual funds that were first offered to plan participants within the six-year limitations period, *id.* at 128-142, because it had already held that ERISA's statute of limitations barred petitioners' claims with respect to the other

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[2] The district court employed de novo review because the Plan did not include language granting the Benefits Committee discretion to interpret the Plan during part of the limitations period. See Pet. App. 214.

three funds. The court allowed petitioners to argue that certain changed circumstances required removal of the latter three funds, but then rejected that argument. *Id.* at 142-150.

3. The court of appeals affirmed. Pet. App. 1-64. The court assessed the timeliness of petitioners' claim about retaining the imprudent investments under 29 U.S.C. 1113(1)(A), the provision that requires suit to be brought within six years of the "last action" constituting the fiduciary breach. Pet. App. 17. The court reasoned that "the act of designating an investment for inclusion starts the six-year period under [Section 1113(1)(A)] for claims asserting imprudence in the design of the plan menu," and so such a claim must be filed within six years of the initial designation. *Id.* at 17-18. The court also stated that it had previously rejected a "continuing violation theory" for ERISA claims. *Id.* at 17 (citing *Phillips* v. *Alaska Hotel & Rest. Emps. Pension Fund*, 944 F.2d 509, 520 (9th Cir. 1991), cert. denied, 504 U.S. 911 (1992)).

The court then concluded that abuse-of-discretion review applies to petitioners' claim that respondents' revenue-sharing arrangement violated plan terms. Pet. App. 37-43. The court stated that "when the plan grants interpretive authority to its administrator," "a deferential abuse of discretion standard applies to the administrator's determinations," including when the claim is an alleged failure to comply with plan terms. *Id.* at 38. In the court's view, such deferential review is consistent with principles of trust law, fosters uniformity in plan interpretation, and balances the need to protect plan participants and the desire to encourage employers to offer ERISA plans. *Id.* at 38, 41-43.

Appling that standard, the court rejected petitioners' revenue-sharing claim. *Id.* at 43-45.

DISCUSSION

Petitioners first seek review (Pet. 16-26) of the question whether 29 U.S.C. 1113(1) bars claims that fiduciaries violated their duty of prudence under 29 U.S.C 1104(a)(1)(B) by offering imprudent investments as part of an ERISA plan, when the investments were first selected more than six years before the plaintiff filed suit. The court of appeals erred in finding such claims time-barred. ERISA imposes a continuing duty of prudence on plan fiduciaries, and respondents breached that duty throughout the limitations period by continuing to offer higher-cost investment options when identical lower-cost options were available. The court of appeals' decision conflicts with the decisions of other courts of appeals, and the statute-of-limitations issue is an important one. The Court therefore should grant certiorari on that question.

Petitioners also seek review (Pet. 26-38) of the question whether abuse-of-discretion review applies to a claim that a plan administrator that has been given discretionary interpretive authority violated its duty to administer the Plan in accordance with its terms, as required by 29 U.S.C. 1104(a)(1)(D). The court of appeals correctly determined that abuse-of-discretion review applies in these circumstances, although it failed to consider several factors relevant to such review. This Court should deny review of that ruling. The question was only minimally briefed below; the courts of appeals do not disagree on that question with respect to Section 1104(a)(1)(D) claims; and resolution

of that question may not affect the outcome of this case.

A. The Statute-Of-Limitations Question Warrants This Court's Review

1. Section 1113 of Title 29 of the United States Code provides that "[n]o action may be commenced" with respect to "a fiduciary's breach of any responsibility, duty, or obligation under" ERISA after six years from "(A) the date of the last action which constituted a part of the breach or violation, or (B) in the case of an omission the latest date on which the fiduciary could have cured the breach or violation." 29 U.S.C. 1113(1). A three-year limitations period applies if the plaintiff had "actual knowledge of the breach or violation," and a six-year discovery rule applies in "case[s] of fraud or concealment." 29 U.S.C. 1113. Neither of those special rules applies here.[3]

The court of appeals erred in concluding that Section 1113(1) bars petitioners' claims that respondents breached their duty of prudence by offering higher-cost retail-class mutual funds, rather than identical lower-cost institutional-class funds, because the higher-cost funds were first selected as plan investments before the limitations period. Pet. App. 16-19. Plan fiduciaries have a "continuing fiduciary duty" to "review plan investments and eliminate imprudent ones." *Martin* v. *Consultants & Adm'rs, Inc.*, 966

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[3] Petitioners sought to invoke the special rule for fraud or concealment; the district court rejected that argument, Pet. App. 179-181, and petitioners did not renew it on appeal. Respondents argued that the shortened limitations period should apply because petitioners had actual knowledge of the breach; the district court and court of appeals rejected that argument, *id.* at 19-21, 181, and respondents did not cross-petition on that issue.

F.2d 1078, 1087-1088 (7th Cir. 1992). A fiduciary breaches that duty when it fails to monitor and periodically evaluate the performance of and fees charged by plan investments, fails to investigate alternative investment options, and fails to remove funds that shortchange participants by charging excessive fees. ERISA requires fiduciaries to use "the care, skill, prudence, and diligence" that a prudent person would use in managing similar investments in like circumstances. 29 U.S.C. 1104(a)(1)(B). Because a defined-contribution plan generally "seeks * * * to maximize retirement savings for participants," *Fifth Third Bancorp* v. *Dudenhoeffer*, 134 S. Ct. 2459, 2467-2468 (2014), no prudent fiduciary would pay fees that were higher than necessary. And any prudent ERISA fiduciary would continue to assess the performance and costs of plan investments after the initial choice is made.

The record reflects that sensible understanding of fiduciary duties. Here, the Investment Committees not only chose the initial funds to offer to plan participants, but they also were responsible for ongoing monitoring and maintenance of plan investments, and they met quarterly to fulfill that responsibility. Pet. App. 72; Statement of Uncontroverted Facts 16 (¶ 65); see Pet. 3. The district court, sustained by the court of appeals, found that the Investment Committees "failed to investigate the possibility of institutional-share class alternatives" to the retail-class funds, even though a prudent investor "would have reviewed all available share classes and the relative costs of each." Pet. App. 61, 63; see *id.* at 85-92.

Petitioners' claim that respondents breached their duty of prudence is not untimely simply because re-

spondents first offered the funds more than six years before this suit was filed. Plan participants may bring suit for any breaches of fiduciary duty within that six-year period—regardless of whether they challenged the first breach of that type. Fiduciaries have a continuing duty to manage plan investments prudently, and a prior failure to do so does not excuse similar failures within the limitations period. It does not matter if a different fiduciary initially chose the investments, because the new fiduciary has a duty to cure breaches by a co-fiduciary. 29 U.S.C. 1105(a)(3). And because ERISA expressly authorizes suits for both affirmative actions and omissions, a plaintiff may sue based on retention of imprudent investments, even if the fiduciary took no affirmative steps to renew those investments. See 29 U.S.C. 1113(1). In the case of an omission, so long as the "latest date on which the fiduciary could have cured the breach or violation" is within six years of the suit, the claim is timely. 29 U.S.C. 1113(1)(B).

Permitting plaintiffs to sue for retention of imprudent investments is consistent with the law of trusts. A trustee generally has a duty to examine and review trust investments, both when the trustee first takes office and periodically throughout the life of the trusteeship, and to sell imprudent trust investments. See, *e.g.*, George G. Bogert et al., *The Law of Trusts and Trustees* §§ 684-685, at 144-171 (3d ed. 2009); Restatement (Third) of Trusts § 90 cmt. b, at 294-296 (2007); Restatement (Second) of Trusts § 230, at 544-550 (1959). The trustee's duties include the duty to divest investments that were appropriate when first made but subsequently have become inappropriate. See Restatement (Second) of Trusts § 231, at 550-555.

Accordingly, both under ERISA and trust law, fiduciaries have an ongoing duty of prudence.

2. The court of appeals found petitioners' claims untimely by focusing on 29 U.S.C. 1113(1)(A) and concluding that the "last action which constituted a part of the breach or violation" occurred when the Investment Committees made the initial selection of plan investments. Pet. App. 17. That analysis rests on a misunderstanding of petitioners' claim. Petitioners sought to recover "losses caused to the Plan * * * within the six years preceding commencement of their action" by respondents' "failure" to "switch[] from retail to institutional class shares." Pet. C.A. Br. 16 (citation and internal quotation marks omitted). Petitioners expressly argued that respondents violated their fiduciary duties *within* the limitations period through both actions constituting a breach and omissions that failed to cure prior breaches, and they invoked both parts of Section 1113(1). *Ibid.* ("[T]he 'last action which constituted a part of the breach'—using retail class shares—occurred within six years and the 'latest date on which the fiduciary could have cured the breach'—replacing retail with institutional shares—also occurred within six years." (quoting 29 U.S.C. 1113(1)(A)-(B)); see Second Am. Compl. ¶ 73 (alleging that respondents breached their fiduciary duties by "subjecting the Plan and its participants to the high costs of retail/publicly-traded mutual funds and failing to provide investment options with significantly lower costs"). Petitioners' arguments before this Court similarly involve both "acts of commission and omission." Pet. 24; see Pet. i, 11, 17-20.

At a minimum, petitioners' claim was timely under 29 U.S.C. 1113(1)(B)—the provision addressing

omissions—because respondents had a duty to prudently manage investments during the limitations period but failed to do so by not investigating whether lower-cost institutional-class funds were available and by switching to such funds. Whether petitioners' claim also was timely under 29 U.S.C. 1113(1)(A) depends on the particular affirmative actions asserted to be fiduciary breaches. The Investment Committees met quarterly, and it is not clear (from the unsealed record) what (if any) actions they took at those meetings to retain initial investments. The courts below did not address that factual question because they barred petitioners' claims categorically. It was error to bar petitioners' claims under Section 1113(1)(A) without considering whether respondents took affirmative actions within the limitations period to renew the investments.[4]

The court of appeals also held that petitioners' claims were untimely on the ground that a "continuing violation theory" is invalid under ERISA. Pet. App. 17. But petitioners do not argue that there was a "continuing violation," in the sense of one violation starting on the date of the initial selection of investments that permits a plaintiff to obtain damages reaching back to that date. Instead, they contend that respondents breached a continuing *duty* of prudence during the limitations period by failing to re-

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[4] The court of appeals also was wrong to allow petitioners to challenge retention of the higher-cost funds only if they demonstrated "changed circumstances engendering a new breach." Pet. App. 19; see *id.* at 142-150. Respondents have an ongoing duty of prudence, and that duty requires them to periodically assess whether investments remain prudent—regardless of whether any external event should have prompted a review.

search fund options and offer available lower-cost institutional-class investments. Second Am. Compl. ¶¶ 49, 69-78. The decision upon which the court of appeals relied—*Phillips* v. *Alaska Hotel & Restaurant Employees Pension Fund*, 944 F.2d 509 (9th Cir. 1991), cert. denied, 504 U.S. 911 (1992)—did not address the timeliness of a claim for failure to discharge fiduciary duties under Section 1113(1). Instead, the court there addressed the shortened limitations period applicable when a plaintiff had actual knowledge of a fiduciary breach, and its holding was based on the materially different language of that provision, which refers to the "earliest date" the plaintiff had knowledge, rather than the "last action" constituting a breach or the "latest date" when the breach could have been cured. See 944 F.2d at 520; compare 29 U.S.C. 1113(2) with 29 U.S.C. 1113(1).

The court of appeals' rule effectively exempts plan fiduciaries from important ongoing fiduciary duties concerning investment options first offered more than six years earlier and fails to protect plan participants' retirement savings. A participant who invested in the Plan more than six years after the initial investment decision could never sue, even if the investment was an obviously imprudent one. And a person who became a fiduciary within the limitations period would be immunized from liability even if she never reviewed the investments. Under the court of appeals' rule, fiduciaries would have no incentive to monitor and update plan investments, and they could retain imprudent investment options forever (absent changed circumstances) once the investment options have been available for more than six years.

3. The circuits are in disagreement on the first question presented. Like the Ninth Circuit, the Fourth Circuit has held that the statute of limitations bars a claim that plan fiduciaries breached their duty of prudence "by failing to remove or replace" imprudent funds in an ERISA 401(k) plan if the funds were initially selected before the limitations period. See *David* v. *Alphin*, 704 F.3d 327, 331-332, 341 (2013). The Fourth Circuit reasoned that in the absence of a "material change in circumstances," the claim was "simply another challenge to the initial selection of the funds." *Id.* at 341.[5]

The Eleventh Circuit also has held that Section 1113(1) bars a claim for breach of fiduciary duty based on the failure to remove imprudent funds from an ERISA 401(k) plan when the funds were first selected before the limitations period. See *Fuller* v. *Suntrust Banks, Inc.*, 744 F.3d 685, 700-702 (2014). Relying on *David* and the court of appeals' decision in this case, the Eleventh Circuit concluded that the fiduciaries' "continued failure to heed warnings of the funds' low performance and high fees or to seek out such information" is not "a distinct, cognizable breach separate from the alleged breach that occurred at selection." *Id.* at 701.[6]

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[5] The *David* court stated that it "d[id] not decide whether ERISA fiduciaries have an ongoing duty to remove imprudent investments," but that statement is difficult to reconcile with the court's holding that the plaintiffs were limited to a claim challenging "the initial selection of the funds" and could not bring a claim based on imprudent retention of the funds. 704 F.3d at 341.

[6] Respondents cite (Br. in Opp. 7-8) a number of other decisions that they say reject a "continuing violation theory," but none of those decisions addressed the timeliness of a fiduciary-breach claim under Section 1113(1).

In contrast, the Second and Seventh Circuits have recognized that ERISA imposes on fiduciaries an ongoing duty to manage plan assets prudently, including a duty to remove previously-chosen plan investments if it is not prudent to maintain them. In *Martin* v. *Consultants & Administrators, Inc.*, *supra*, the Seventh Circuit held that a claim that plan trustees violated their fiduciary duties by renewing an imprudent contract was timely under 29 U.S.C. 1113(1), even though the contract was first awarded before the limitations period, because "the trustees are under a continuing fiduciary duty pursuant to ERISA." 966 F.2d at 1087-1088 & n.10. The court also found timely a claim that the trustees failed to monitor a service provider's performance, even though the provider was first engaged before the limitations period, because ERISA imposes a "continuing fiduciary duty" and so a "past violation generally should not be held to preclude a suit for a repeated or continued violation." *Id.* at 1089.

Similarly, in *Morrissey* v. *Curran*, 567 F.2d 546 (1977), the Second Circuit reversed the dismissal of a complaint that plan fiduciaries breached their fiduciary duties by failing to remove imprudent investments from an ERISA plan. *Id.* at 548-549 & n.9. The court rejected the argument that the fiduciaries were immune from liability because the original investment decision was made before ERISA was enacted. *Id.* at 548. Although *Morrissey* is potentially distinguishable from the decision below because the defendants' objection was that the courts lacked jurisdiction over the claim because it accrued before ERISA's effective date (not a statute-of-limitations bar), the central question in *Morrissey* was the same as in this case—

whether participants may sue for an ongoing breach of the duty of prudence when they cannot challenge the initial choice of the imprudent investment.

The disagreement in the circuits warrants this Court's review. As of 2011, more than 60 million people invested their retirement savings in employer-sponsored 401(k) plans, which held $2.2 trillion in assets. United States Dep't of Labor, Fact Sheet, http://www.dol.gov/ebsa/pdf/fsinvestmentadvicefinal.pdf (2011). The court of appeals' holding undermines the security and integrity of those funds by effectively exempting ERISA fiduciaries from their statutorily-mandated, ongoing duty of prudence simply because they first committed a similar violation more than six years earlier. The Court therefore should grant certiorari on the first question presented.

B. The Standard-Of-Review Question Does Not Warrant This Court's Review

An ERISA fiduciary must discharge his duties "in accordance with the documents and instruments governing the plan," so long as they are consistent with ERISA. 29 U.S.C. 1104(a)(1)(D). Petitioners contend (Pet. 10) that respondents violated that requirement because the Plan provided that "[t]he cost of the administration of the Plan will be paid by the Company," Pet. App. 36, while under the revenue-sharing arrangement, plan participants paid some of those costs. The court of appeals determined that abuse-of-discretion review applies to this claim, because it rests on a question of plan interpretation, and the Plan grants the Benefits Committee discretion to interpret the Plan. *Id.* at 37-43. This Court's review of that holding is not warranted, for three reasons.

1. First, the court of appeals was correct to conclude that abuse-of-discretion review applies with respect to the particular claim in this case—a Section 1104(a)(1)(D) claim that the fiduciary violated plan terms, which turns on the reasonableness of the fiduciary's interpretation of the plan rather than any asserted conflict with ERISA, where the plan expressly grants the fiduciary discretionary interpretive authority. Although this Court's decisions concerning abuse-of-discretion review under ERISA all concerned claims for benefits under 29 U.S.C. 1132(a)(1)(B), the Court's reasoning also applies to claims based on Section 1104(a)(1)(D) for failure to follow plan terms. In *Firestone Tire & Rubber Co.* v. *Bruch*, 489 U.S. 101 (1989), the Court explained that, because ERISA does not specify a standard of review for benefit denials, it was appropriate to turn to principles of trust law. *Id.* at 109-111. The Court noted that under trust law, a fiduciary's decisions are generally reviewed de novo, unless the trust instrument grants the trustee discretionary interpretive authority and the trustee exercises that authority, in which case deferential review applies. *Id.* at 111-115.

The principles the Court relied upon in *Firestone* apply here. Section 187 of the Second Restatement of Trusts provides that "[w]here discretion is conferred upon the trustee with respect to the exercise of a power, its exercise is not subject to control by the court" absent "an abuse by the trustee of his discretion." Restatement (Second) of Trusts § 187, at 402. Whether there is an abuse of discretion depends, *inter alia*, on the "extent of the discretion" conferred on the trustee, the trustee's motives, and any conflict of interest of the trustee. *Id.* § 187 cmt. d, at 403; see,

e.g., Austin W. Scott et al., *Scott and Ascher on Trusts* § 18.2, at 1342-1343 (5th ed. 2007). In line with those principles, in a suit based on Section 1104(a)(1)(D), if the plan administrator has authoritatively interpreted the plan, and the plan gives the administrator the discretionary authority to do so, then deferential review applies to the interpretation.[7]

So long as the plan interpretation is reasonable and consistent with ERISA, it is not an abuse of discretion, even if another reasonable interpretation would be more advantageous to participants. But abuse-of-discretion review does not apply to claims that a fiduciary breached the duties of loyalty and prudence set out in Section 1104(a)(1)(A)-(C). The duties of loyalty and prudence are not derived from plan terms, but rather are long recognized in trust law and imposed by ERISA itself. Similarly, a claim that a plan fiduciary's interpretation of plan terms conflicts with ERISA should be reviewed de novo to the extent it turns on a question of statutory interpretation, as opposed to plan interpretation.

Although the court of appeals correctly decided that abuse-of-discretion review applies to the particular claim here, it did not consider several factors that may bear on whether the fiduciary's interpretation should be accepted. First, if the plan administrator

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[7] In *Central States, Southeast and Southwest Areas Pension Fund* v. *Central Transport Inc.*, 472 U.S. 559 (1985), a pre-*Firestone* case, the Court gave "significant weight" to the trustees' determination that a multi-employer plan permitted them to audit employer records, because the trust agreement provided that "any construction [of the agreement's provisions] adopted by the Trustees in good faith shall be binding," and there was "no evidence of a bad-faith motive." *Id.* at 568 (brackets in original).

has a financial conflict of interest, the court should weigh that factor in its review. *Metropolitan Life Ins. Co.* v. *Glenn*, 554 U.S. 105, 115 (2008); *Firestone*, 489 U.S. at 115. Here, petitioners contend (Pet. 33) that respondents' interpretation "advances the interests of Edison contrary to the interests of Plan participants." Second, the court should consider whether the plan administrator's interpretation of the Plan was a deliberative choice or a post-hoc rationalization. When a fiduciary interprets plan language in the context of a benefits claim, participants are entitled to significant procedural and substantive protections, and the administrator generally must document its reasoning. See 29 U.S.C. 1133; 29 C.F.R. 2560.503-1. In the absence of such a process, a reviewing court should consider whether the fiduciary exercised its discretion to interpret the plan or simply did not consider the matter. See Restatement (Second) of Trusts § 187, cmt. h, at 405 (court will not defer to a trustee who fails to exercise his judgment). In this case, for example, it is unclear when and how respondents exercised their discretionary interpretive authority to authorize revenue sharing. If there is no actual plan interpretation, no deference is due. Third, the court should consider whether the entity granted discretionary interpretive authority was the one exercising it. The Plan here grants such interpretive authority to the Benefits Committee, but it appears that the decision to invest in the mutual funds was made by the Investment Committees. Pet. App. 72, 211.

The court of appeals likely did not consider these factors because, as described below, the parties did not focus on the standard-of-review question in the

briefing. But they should be considered in assessing a Section 1104(a)(1)(D) claim like the one here.

2. The standard-of-review question was not the focus of the briefing below, and it is unclear whether resolution of that question would change the outcome in this case. The district court decided petitioners' Section 1104(a)(1)(D) claim under both abuse-of-discretion and de novo review because for the first part of the limitations period (August 2001 to November 2001), the Plan did not include language giving the administrator interpretive discretion. Pet. App. 211, 214. The court concluded that nothing in the Plan expressly prohibited revenue sharing and that the course of dealing under the Plan showed that respondents' interpretation was "correct." *Id.* at 214-219.

Petitioners appealed, but their opening brief did not address whether abuse-of-discretion or de novo review applied to their Section 1104(a)(1)(D) claim. Instead, they argued that the Plan unambiguously prohibited revenue sharing and that, even if the plan were ambiguous, the district court should have denied summary judgment because there were disputed factual issues. Pet. C.A. Br. 32-38. Petitioners' brief did not cite *Firestone* or address whether a plan interpretation rendered outside the context of a benefits decision should be treated differently from an interpretation in that context. In their answering brief, respondents contended that their plan interpretation was entitled to deference, but they also argued that the district court's interpretation was correct under de novo review. Resp. C.A. Br. 46-52. In their reply brief, petitioners argued for the first time on appeal that deferential review is inapplicable in the context of

a Section 1104(a)(1)(D) claim. See Pet. C.A. Reply Br. 43-45.

Although the court of appeals did decide the standard-of-review question, this case would be a poor vehicle for considering that question. Because the question was barely briefed below, the court did not consider various factors that might affect the application of abuse-of-discretion review. Moreover, there is a substantial question whether petitioners would prevail even under de novo review. The district court determined that respondents' interpretation was correct on de novo review, Pet. App. 217, and the court of appeals relied on the same extrinsic evidence as the district court in upholding the interpretation under abuse-of-discretion review, *id.* at 43-45. And, before this Court, rather than contest that extrinsic evidence, petitioners instead argue that the plan terms are unambiguous (and therefore could not be overcome by extrinsic evidence), see Cert. Reply Br. 10 n.9—an argument that does not depend on the standard of review.

3. Finally, there is no disagreement in the circuits on the question whether, in a suit based specifically on 29 U.S.C. 1104(a)(1)(D), deferential review applies to a plan administrator's interpretation when the plan gives the administrator discretionary interpretive authority and the claim turns on the reasonableness of the interpretation. The only other court that has expressly considered the question has agreed that abuse-of-discretion review applies in that situation. See *Ganton Techs., Inc.* v. *National Indust. Grp. Pension Plan*, 76 F.3d 462, 466-467 (2d Cir. 1996).

Petitioners cite (Pet. 28-31) decisions from the Second and Third Circuits, but those decisions address

claims of breach of the fiduciary duties of loyalty and prudence under Section 1104(a)(1)(A) and (B), not a claim that a fiduciary failed to follow plan terms in violation of Section 1104(a)(1)(D). Post-*Firestone*, there is some confusion in the circuits on the question whether deferential review applies to a claim of breach of the duties of loyalty or prudence, where the claim turns on plan interpretation and the plan grants the administrator discretionary authority,[8] and there

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[8] In *John Blair Communications, Inc. Profit Sharing Plan* v. *Telemundo Group, Inc. Profit Sharing Plan*, 26 F.3d 360, 368-370 (1994), the Second Circuit held that de novo review applies to a claim that the fiduciary breached its duty of loyalty by using investment gains from one plan's assets to benefit another plan. But see *Ganton Techs.*, 76 F.3d at 466-467 (applying deferential review to a breach-of-loyalty claim without citing *John Blair*). In *In re Unisys Savings Plan Litigation*, 173 F.3d 145, 154, cert. denied, 528 U.S. 950 (1999), the Third Circuit applied de novo review to a claim that fiduciaries breached the duties of loyalty and prudence. See *Struble* v. *New Jersey Brewery Emps.' Welfare Trust Fund*, 732 F.2d 325, 333 (3d Cir. 1984); but see *Moench* v. *Robertson*, 62 F.3d 553, 565-568 (1995), cert. denied, 516 U.S. 1115 (1996) (applying deferential review to breach-of-fiduciary-duty claims in the context of an employee stock ownership plan), abrogated by *Fifth Third Bancorp*, 134 S. Ct. at 2467.

In *Tussey* v. *ABB, Inc.*, 746 F.3d 327, 333-335, 336, 338 (2014), petition for cert. pending, No. 14-130 (filed Aug. 5, 2014), the Eighth Circuit held that abuse-of-discretion review applies to a plan interpretation that arises in the context of claims that fiduciaries breached the duties of prudence and loyalty. Although that case included a Section 1104(a)(1)(D) claim, see No. 2:06-CV-4305, 2012 WL 1113291, at *14 (W.D. Mo. Mar. 31, 2012), the Eighth Circuit did not address the standard of review applicable to it, see 746 F.3d at 338.

In *Hunter* v. *Caliber System, Inc.*, 220 F.3d 702, 709-712 (2000), the Sixth Circuit applied deferential review to a claim of violation of ERISA's anti-cutback provision, 29 U.S.C. 1054(g),

is a petition pending on that question. See *Tussey* v. *ABB, Inc.*, 746 F.3d 327 (8th Cir. 2014), petition for cert. pending, No. 14-130 (filed Aug. 5, 2014). But that confusion does not warrant further review of the standard-of-review holding in this case, because a claim of failure to follow plan terms is fundamentally different from a claim that a fiduciary was imprudent or disloyal, in violation of the requirements of ERISA itself. See p. 18, *supra*. For that reason as well, further review of the second question presented is unwarranted.

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that depended on a plan interpretation. The case also involved fiduciary-breach and failure-to-comply-with-plan claims, but the Sixth Circuit did not separately address the standards of review for them. 220 F.3d at 717-724.

CONCLUSION

The petition for a writ of certiorari should be granted with respect to the first question presented. The petition should be denied with respect to the second question presented.

Respectfully submitted.

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AUGUST 2014

JOINT APPENDIX

No. 13-550

IN THE
Supreme Court of the United States

GLENN TIBBLE, ET AL.,
Petitioners,

v.

EDISON INTERNATIONAL, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

JOINT APPENDIX

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CERTIORARI GRANTED: OCT. 2, 2014

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NOTICE

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Case No. CV 07-5359 SVW (AGRx)

GLENN TIBBLE, AS REPRESENTATIVE OF A CLASS OF SIMILARLY SITUATED PERSONS, AND ON BEHALF OF THE PLAN, ET AL.,
Plaintiffs,

v.

EDISON INTERNATIONAL, ET AL.,
Defendants.

CIVIL DOCKET

Date Filed	#	Docket Text
8/16/07	1	COMPLAINT against Defendants Edison International, The Edison International Benefits Committee, Edison International Trust Investment Committee, Secretary of the Edison International Benefits Committee, Southern California Edison's Vice President of Human Resources, Manager of Southern California Edison's HR Service Center. (Filing fee $350 PAID.) Jury Demanded, filed by Plaintiffs Henry Runowiecki, Frederick Suhadolc, Hugh Tinman, Jr, Glenn Tibble, William Bauer, William Izral. (et) (Entered: 8/27/07)

* * *

10/22/07	7	DEFENDANTS' MOTION to Dismiss Plaintiffs' Class Action Complaint filed by Defendants Edison International, [et al.]. Motion set for hearing on 11/19/07 at 1:30 PM before Judge Stephen V. Wilson. Lodged Proposed Order. (vh) (Entered: 10/25/07)
10/22/07	8	MEMORANDUM OF POINTS AND AUTHORITIES in Support of Defendants' Motion to Dismiss Class Action Complaint 7 filed by Defendants Edison International, [et al.]. (vh) (Entered: 10/25/07)

* * *

11/5/07	12	MEMORANDUM in Opposition to Defendants' MOTION to Dismiss Plaintiffs' Class Action Complaint 7 filed by Plaintiffs Henry Runowiecki, [et al.]. (vh) (Entered: 11/9/07)

* * *

11/13/07	16	REPLY Memorandum of Points and Authorities in Support of Defendants' Motion to Dismiss Plaintiffs' Class Action Complaint 7 filed by Defendants Edison International, [et al.]. (vh) (Entered: 11/15/07)

* * *

11/19/07	18	MINUTES OF Motion Hearing RE: MOTION to Dismiss Case 7 held before Judge Stephen V. Wilson: The motion is submitted. Order to issue.

		Court Reporter: Sandra Becerra. (pc) (Entered: 11/20/07)
		* * *
1/14/08	23	TRANSCRIPT filed for proceedings held on 11/19/07 Court Reporter: Sandra L. Becerra. (bem) (Entered: 2/1/08)
3/12/08	24	MEMORANDUM in Opposition to MOTION to Dismiss Case 7 *Plaintiffs' Class Action Complaint* filed by Plaintiffs Henry Runowiecki, [et al.]. (Attachments: #1 Exhibit A & B to Supp Memo in Opp) (Templeton, G) (Entered: 3/12/08)
3/14/08	25	REPLY filed by Defendants Edison International, [et al.] to MEMORANDUM in Opposition to Motion, 24/ *Defendants' Reply to Plaintiffs' Supplemental Memorandum of Points and Authorities in Opposition to Defendants' Motion to Dismiss Plaintiffs' Class Action Complaint* (Attachments: #1 Proof of Service) (Kwak, Linda) (Entered: 3/14/08)
7/16/08	26	ORDER GRANTING-IN-PART AND DENYING-IN-PART DEFENDANTS MOTION TO DISMISS 7 by Judge Stephen V. Wilson: Defendants Motion to Dismiss is GRANTED-IN-PART and DENIED-IN-PART. Plaintiffs have twenty (20) days from the date of this Order to file an amended complaint providing appropriate allegations regarding Defendants Edison

and SCE. (See document for details.) (pc) (Entered: 7/16/08)

* * *

8/5/08 35 FIRST AMENDED COMPLAINT against defendants Edison International, [et al.] amending Complaint – (Discovery), Complaint – (Discovery), Complaint – (Discovery) 1, filed by Plaintiffs Henry Runowiecki, [et al.] (pj) (Entered: 8/7/08)

* * *

9/4/08 44 ANSWER to Amended Complaint, 35/ *Answer and Affirmative Defenses to First Amended Complaint for Breach of Fiduciary Duty* filed by Defendants Edison International, [et al.]. (Attachments: #1 Proof of Service) (Eastus, Matthew) (Entered: 9/4/08)

* * *

4/15/09 116 Joint STIPULATION for Leave to File Second Amended Complaint filed by Plaintiff Henry Runowiecki, [et al.]. (Attachments: #1 Exhibit A – Second Amended Complaint, #2 Proposed Order) (Kelly, Jason) (Entered: 4/15/09)

* * *

4/28/09 124 ORDER by Judge Stephen V. Wilson Regarding Filing of Second Amended Complaint. Pursuant to the Stipulation of the parties 116, IT IS HEREBY ORDERED that Plaintiffs are hereby granted leave to file their

Second Amended Complaint. The Second Amended Complaint is deemed served upon Defendants on the same day Plaintiffs lodged the Amended Complaint with the Court (April 14, 2009). Defendants Answer shall be filed on or before 4/29/09. (mg) (Entered: 4/30/09)

4/29/09 121 ANSWER *and Affirmative Defenses to Plaintiff's Second Amended Complaint for Breach of Fiduciary Duty [Document entry 116]* filed by Defendants Edison International, [et al.]. (Attachments: #1 Proof of Service) (Longo, Amy) (Entered: 4/29/09)

* * *

5/8/09 133 NOTICE OF MOTION AND MOTION to Certify Class filed by Plaintiff Henry Runowiecki, [et al.]. Motion set for hearing on 6/1/09 at 1:30 PM before Judge Stephen V. Wilson. (Attachments: #1 Exhibit 43, #2 Proposed Order) (Wolff, Nelson) (Entered: 5/8/09)

* * *

5/18/09 142 MEMORANDUM in Opposition to MOTION to Certify Class 133 filed by Defendants Edison International, [et al.]. (Attachments: #1 Declaration of Amy J. Longo in support, #2 Exhibit A-O Under Seal, #3 Proof of Service) (Eccles, Robert) (Entered: 5/18/09)

* * *

5/18/09	146	NOTICE OF MOTION AND MOTION for Summary Judgment filed by Defendants Edison International, [et al.]. Motion set for hearing on 6/8/09 at 1:30 PM before Judge Stephen V. Wilson. (Attachments: #1 Memorandum of Points and Authorities in Support of Defendants' Motion for Summary Judgment, #2 Statement of Uncontroverted Facts and Conclusions of Law in Support of Motion for Summary Judgment, #3 Declaration of Decker, #4 Exhibit Exhibits A-OO filed Under Seal) (Schwartz, Abby) (Entered: 5/18/09)

* * *

5/19/09	150	DECLARATION of Diane Kobashigawa In Support MOTION for Summary Judgment 146 filed by Defendants Edison International, [et al.]. (Attachments: #1 Exhibit A [Filed Under Seal]) (Schwartz, Abby) (Entered: 5/19/09)
5/19/09	151	DECLARATION of David Ertel In Support MOTION for Summary Judgment 146 filed by Defendants Edison International, [et al.]. (Attachments: #1 Exhibit A-Q [Filed Under Seal]) (Schwartz, Abby) (Entered: 5/19/09)
5/19/09	152	DECLARATION of Matthew Eastus In Support of MOTION for Summary Judgment 146 filed by Defendants Edison International, [et al.]. (Attachments: #1 Exhibit A-S [Filed Under

Seal]) (Schwartz, Abby) (Entered: 5/19/09)

5/19/09 153 DECLARATION of John W. Peavy In Support of MOTION for Summary Judgment 146 filed by Defendants Edison International, [et al.]. (Attachments: #1 Exhibit A [Filed Under Seal]) (Schwartz, Abby) (Entered: 5/19/09)

* * *

5/26/09 172 SEALED DOCUMENT – Declaration of Cathy Niden in Support of Motion for Summary Judgment. Exhibits 1-4 (Correcting Exhibits 2-4 Previously filed Under Seal on May 18, 2009) (Attachments: Part 2, Part 3, Part 4, Part 5) (mat) (Entered: 5/28/09)

5/28/09 173 SEALED DOCUMENT – Declaration of Matthew Eastus in Support of Defendants' Motion for Summary Judgment Exhibits A-S Filed Under Seal. (Attachments: Part 2, Part 3, Part 4, Part 5, Part 6) (mat) (Entered: 5/28/09)

5/28/09 174 SEALED DOCUMENT – Exhibits to Declaration of Amy J. Longo in Support of Defendants' Opposition to Plaintiffs' Motion for Class Certification. Exhibits A-O (Attachments: Part 2, Part 3, Part 4, Part 5, Part 6, Part 7, Part 8, Part 9, Part 10, Part 11, Part 12, Part 13, Part 14, Part 15, Part 16, Part 17, Part 18, Part 19, Part 20) (mat) (Entered: 5/28/09)

5/28/09 175 SEALED DOCUMENT – Declaration of Barbara Decker in Support of Defendants' Motion for Summary Exhibits A-OO Filed Under Seal (Vol 5-Exhs. U-FF). (Attachments: Part 2, Part 3, Part 4, Part 5, Part 6, Part 7, Part 8, Part 9, Part 10) (mat) (Entered: 5/28/09)

5/28/09 176 SEALED DOCUMENT – Declaration of Barbara Decker in Support of Defendants' Motion for Summary Judgment Exhibits A-OO Filed Under Seal (Vol 6-Exhs. GG-OO). (Attachments: Part 2, Part 3, Part 4, Part 5, Part 6, Part 7, Part 8, Part 9, Part 10, Part 11, Part 12, Part 13) (mat) (Entered: 5/28/09)

* * *

5/28/09 180 SEALED DOCUMENT – Declaration of Cathy M. Niden, Ph. D. in Support of Defendants' Motion for Summary Judgment Filed Under Seal. (Attachments: Part 2, Part 3, Part 4, Part 5) (mat) (Entered: 5/29/09)

5/28/09 181 SEALED DOCUMENT – Declaration of Barbara Decker in Support of Defendants' Motion for Summary Judgment Exhibits A-OO filed Under Seal (Vol 1-Exhs. A-B) (Attachments: Part 2, Part 3, Part 4, Part 5, Part 6, Part 7, Part 8, Part 9, Part 10) (mat) (Entered: 5/29/09)

5/28/09 182 SEALED DOCUMENT – Declaration of Barbara Decker in Support of

Defendants' Motion for Summary Judgment Exhibits A-OO Filed Under Seal (Vol 2-Exh. C). (Attachments: Part 2, Part 3, Part 4, Part 5, Part 6) (mat) (Entered: 5/29/09)

5/28/09 183 SEALED DOCUMENT – Declaration of Barbara Decker in Support of Defendants' Motion for Summary Judgment Exhibits A-OO Filed Under Seal (Vol 3-Exhs. D). (Attachments: Part 2, Part 3, Part 4, Part 5, Part 6, Part 7, Part 8, Part 9, Part 10) (mat) (Entered: 5/29/09)

5/28/09 184 SEALED DOCUMENT – Declaration of Barbara Decker in Support of Defendants' Motion for Summary Judgment Exhibits A-OO file Under Seal (Vol 4-Exhibits E-T). (Attachments: Part 2, Part 3, Part 4, Part 5, Part 6, Part 7, Part 8) (mat) (Entered: 5/29/09)

5/28/09 199 SEALED DOCUMENT – DECLARATION of DAVID ERTEL IN SUPPORT OF DEFENDANT'S MOTION for Summary Judgment Exhibit A-Q filed (Attachments: #1 part 2, #2 part 3, #3 part 4) (lra) (Entered: 6/1/09)

5/28/09 200 SEALED DOCUMENT – DECLARATION of DIANE KOBASHIGAWA IN SUPPORT OF DEFENDANTS' MOTION for Summary Judgment, Exhibit A filed (lra) (Entered: 6/1/09)

5/28/0[9] 201 SEALED DOCUMENT – DECLARATION of JOHN W. PEAVY IN SUP-

PORT OF DEFENDANT'S MOTION for Summary Judgment, Exhibit A filed (Attachments: #1 PART 2, #2 PART 3, #3 PART 4) (lra) (Entered: 6/1/09)

* * *

5/29/09 186 NOTICE OF MOTION AND MOTION for Partial Summary Judgment as to Liability filed by Plaintiff Henry Runowiecki, [et al.]. Motion set for hearing on 6/22/09 at 1:30 PM before Judge Stephen V. Wilson. (Attachments: #1 Statement of Uncontroverted Facts and Conclusions of Law, #2 Proposed Order) (Wolff, Nelson) (Entered: 5/29/09)

* * *

6/1/09 194 MEMORANDUM of CONTENTIONS of FACT and LAW filed by Defendants Edison International, [et al.]. (Eccles, Robert) (Entered: 6/1/09)

* * *

6/1/09 197 MEMORANDUM of CONTENTIONS of FACT and LAW filed by Plaintiff Henry Runowiecki, [et al.]. (Wolff, Nelson) (Entered: 6/1/09)

6/1/09 198 MEMORANDUM in Opposition to MOTION for Summary Judgment 146 filed by Plaintiffs Henry Runowiecki, [et al.]. (Wolff, Nelson) (Entered: 6/1/09)

6/1/09 202 STATEMENT of STATEMENT OF GENUINE ISSUES IN OPPOSITION

TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT MOTION for Summary Judgment 146 filed by Plaintiffs Henry Runowiecki, [et al.]. (Wolff, Nelson) (Entered: 6/1/09)

* * *

6/2/09 205 STATEMENT OF GENUINE ISSUES IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT filed by Plaintiffs Henry Runowiecki, [et al.] re: MOTION for Summary Judgment 146. (Wolff, Nelson) (Entered: 6/2/09)

* * *

6/5/09 238 SEALED DOCUMENT – Exhibits 16, 38, 39, 62, 83, 84, 89, 90, 93, and 117 in Support of Notice of Errata Regarding Exhibits to Plaintiffs' Memorandum in Opposition to Defendant's Motion for Summary Judgment. (Attachments: Part 2, Part 3, Part 4, Part 5, Part 6, Part 7) (mat) (Entered: 6/9/09)

6/5/09 239 SEALED DOCUMENT – Exhibits 1-119 in Support of Memorandum in Opposition to Defendant's Motion for Summary Judgment. [Volume 1 of 4] (Attachments: Part 2, Part 3, Part 4, Part 5, Part 6, Part 7, Part 8, Part 9, Part 10, Part 11, Part 12, Part 13, Part 14, Part 16, Part 17) (mat) (Entered: 6/9/09)

6/5/09 240 SEALED DOCUMENT – Exhibits 1-119 in Support of Memorandum in

Opposition to Defendant's Motion for Summary Judgment. [Vol. 2 of 4] (Attachments: Part 2, Part 3, Part 4) (mat) (Entered: 6/9/09)

6/5/09 241 SEALED DOCUMENT – Exhibits 1-119 in Support of Memorandum in Opposition to Defendant's Motion for Summary Judgment. [Vol. 3 of 4] (Attachments: Part 2, Part 3, Part 4, Part 5, Part 6) (mat) (Entered: 6/9/09)

6/5/09 242 SEALED DOCUMENT – Exhibits 1-119 in Support of Memorandum in Opposition to Defendant's Motion for Summary Judgment. [Vol. 4 of 4] (Attachments: Part 2, Part 3, Part 4) (mat) (Entered: 6/9/09)

* * *

6/5/09 253 SEALED DOCUMENT – Exhibits A-CC to Plaintiffs' Statement of Uncontroverted Facts and Conclusions of Law. (Attachments: Part 2, Part 3, Part 4, Part 5,Part 6, Part 7, Part 8, Part 9, Part 10, Part 11, Part 12, Part 13, Part 14, Part 15) (mat) (Entered: 6/10/09)

* * *

6/8/09 223 MEMORANDUM in Support of MOTION for Summary Judgment 146 filed by Defendants Edison International, [et al.]. (Attachments: #1 Declaration of Tanya Guzman [Public Version]) (Eccles, Robert) (Entered: 6/8/09)

6/8/09 224 OBJECTIONS in support of re: MOTION for Summary Judgment 146/ *Defendants' Objections to (1) Plaintiffs' Responses to Defendants' Statement of Uncontroverted Facts in support of Defendants' Motion for Summary Judgment; and (2) Additional Facts in Opposition to Defendants' Motion for Summary Judgment* filed by Defendants Edison International, [et al.]. (Eccles, Robert) (Entered: 6/8/09)

6/8/09 225 REPLY in Support MOTION to Certify Class 133 filed by Plaintiffs Henry Runowiecki, [et al.]. (Attachments: #1 Exhibit A) (Wolff, Nelson) (Entered: 6/8/09)

* * *

6/8/09 228 MEMORANDUM in Opposition to MOTION for Partial Summary Judgment as to Liability 186/*Of Points and Authorities* filed by Defendants Edison International, [et al.]. (Attachments: #1 Declaration of Matthew P. Eastus Re: Defendants' Opposition to Plaintiffs' Motion for Summary Judgment, #2 Declaration (supplemental) of Barbara Decker Re: Defendants' Opposition to Plaintiffs' Motion for Partial Summary Judgment) (Eccles, Robert) (Entered: 6/8/09)

* * *

6/8/09 231 STATEMENT of Genuine Issues in Opposition to MOTION for Partial

Summary Judgment as to Liability 186 filed by Defendants Edison International, [et al.]. (Attachments: #1 Statement of Genuine Issues in Opposition to Plaintiffs' Motion for Partial Summary Judgment Part 2) (Eccles, Robert) (Entered: 6/8/09)

* * *

6/8/09 233 Objection re: MOTION for Partial Summary Judgment as to Liability 186 *To Plaintiffs' Statement of Uncontroverted Facts in Support of Their Motion for Summary Judgment* filed by Defendants Edison International, [et al.]. (Eccles, Robert) (Entered: 6/8/09)

* * *

6/9/09 248 REPLY In Support Of MOTION for Summary Judgment 146/*Corrected Reply Memorandum of Points and Authorities* 247 filed by Defendants Edison International, [et al.]. (Eccles, Robert) (Entered: 6/9/09)

* * *

6/15/09 260 REPLY Support MOTION for Partial Summary Judgment as to Liability 186 filed by Plaintiffs Henry Runowiecki, [et al.]. (Attachments: #1 Plaintiffs' Response and Objections to Defendants' Statement of Genuine Issues) (Wolff, Nelson) (Entered: 6/15/09)

* * *

6/16/09 267 SEALED DOCUMENT – Supplemental Declaration of Barbara Decker Re: Defendants' Opposition to Plaintiffs' Motion for Partial Summary Judgment. (mat) (Entered: 6/19/09)

* * *

6/16/09 272 SEALED DOCUMENT – Declaration of Tanya Guzman Attaching Exhibits in Support of Defendants' Reply Brief Re: Defendants' Motion for Summary Judgment. (mat) (Entered: 6/19/09)

6/16/09 276 SEALED DOCUMENT – Declaration of Matthew P. Eastus Re: Defendants' Opposition to Plaintiffs' Motion for Summary Judgment. Exhibits A-S filed under seal. (Attachments: Part 2, Part 3, Part 4) (mat) (Entered: 6/19/09)

* * *

6/17/09 264 STATEMENT of Corrected Statement Of Uncontroverted Facts and Conclusions Of Law In Support of Defendants' Motion For Summary Judgment MOTION for Summary Judgment 146 filed by Defendants Edison International, [et al.]. (Eccles, Robert) (Entered: 6/17/09)

6/18/09 265 NOTICE Of Supplemental Authority filed by Defendants Edison International, [et al.]. / *Related to Docket Entry 142* (Attachments: #1 Exhibit A to Notice of Supplemental Authority, #2 Proof of Service) (Longo, Amy) (Entered: 6/18/09)

6/19/09 273 OPPOSITION to MOTION for Summary Judgment 146 *Supplemental Memorandum* filed by Plaintiffs Henry Runowiecki, [et al.]. (Attachments: #1 Exhibit 1) (Wolff, Nelson) (Entered: 6/19/09)

* * *

6/19/09 275 SUPPLEMENT to MOTION to Certify Class 133 *Response to Defendants' Notice of Supplemental Authority* (Doc. 265) filed by Plaintiffs Henry Runowiecki, [et al.]. (Wolff, Nelson) (Entered: 6/19/09)

6/19/09 277 SEALED DOCUMENT – Exhibits A-G of Plaintiffs' Reply in Support of Their Motion for Partial Summary Judgment. (mat) (Entered: 6/22/09)

* * *

6/22/09 280 MINUTES before Judge Stephen V Wilson: 1. PLAINTIFFS' MOTION FOR CLASS CERTIFICATION 133 (fld 5/8/09) 2. DEFENDANTS' MOTION TO EXCLUDE TESTIMONY OF ROSS M. MILLER 143 (fld 5/18/09) 3. DEFENDANTS' MOTION TO EXCLUDE TESTIMONY OF DAVID J. WITZ 145 (fld 5/18/09) 4. DEFENDANTS' MOTION FOR SUMMARY JUDGMENT 146 (fld 5/18/09) 5. DEFENDANTS' MOTION TO EXCLUDE TESTIMONY OF STEVEN POMERANTZ 147 (fld 5/18/09) 6. DEFENDANTS' MOTION TO EXCLUDE TESTIMONY OF STEVEN

POMERANTZ 156 (fld 5/19/09) 7. PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT 186 (Fld 5/29/09) 8. PLAINTIFFS' MOTION TO STRIKE THE DECLARATION OF CATHY M. NIDEN 188 (Fld 6/1/09) 9. PRETRIAL CONFERENCE (CT 7/7/09); Pretrial Conference held The motions are submitted. Order to issue. 133, 145, 156, 188, 147, 156, 146, 143, 186; Court Reporter: Freda Mendelsohn. (pj) (Entered: 6/24/09)

* * *

6/24/09 281 MINUTES OF IN CHAMBERS ORDER re DEFENDANTS' MOTION FOR SUMMARY JUDGMENT; PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT; PLAINTIFFS' MOTION FOR CLASS CERTIFICATION held before Judge Stephen V. Wilson: In light of the number of the issues raised in the parties' motions for summary judgment, the July 7, 2009, trial date is vacated, and will be rescheduled if necessary after the Court rules on the motions for summary judgment. An order will issue shortly regarding Plaintiffs' Motion for Class Certification. The parties are ORDERED to supply the Court with supplemental briefing on the following issues: (1) Evidence of the composition/membership of the TIC and Sub-TIC, and the role that the Investment Committee staff played in the decision

regarding what mutual funds were made available to the Plan participants. (2) What evidence there is that the named plaintiffs received the Master Plan documents and SPDs (see e.g., Decker Decl., Ex. A). Defendants shall submit a supplemental brief not to exceed three pages addressing these issues by June 26, 2009, at 4 p.m. Plaintiffs shall file a response brief not to exceed three pages by Monday, June 29, at 12 noon. 146. (pj) (Entered: 6/24/09)

6/25/09 282 SUPPLEMENT to MOTION for Summary Judgment 146/*Notice of Supplemental Authority in Support of Motion for Summary Judgment* filed by Defendants Edison International, [et al.]. (Attachments: #1 Exhibit A to Notice of Supplemental Authority, #2 Proof of Service) (Eccles, Robert) (Entered: 6/25/09)

6/26/09 283 SUPPLEMENT to MOTION for Summary Judgment 146 / *Defendants' Supplemental Brief Pursuant To The Court's June 24, 2009 Order 281* filed by Defendants Edison International, [et al.]. (Attachments: #1 Declaration Of Sergey Trakhtenberg In Support Of Defendants' Supplemental Brief, #2 Proof Of Service) (Eccles, Robert) (Entered: 6/26/09)

6/29/09 284 OPPOSITION to MOTION for *Summary Judgment 146 Supplemental Brief Pursuant to Court's June 24,*

2009 Order (Doc. 281) filed by Plaintiffs Henry Runowiecki, [et al.]. (Wolff, Nelson) (Entered: 6/29/09)

* * *

6/30/09 286 ORDER GRANTING PLAINTIFFS MOTION FOR CLASS CERTIFICATION by Judge Stephen V. Wilson: For the reasons stated above, Plaintiffs Motion for Class Certification is GRANTED. The Court appoints Mr. Bauer, Mr. Tibble, and Mr. Suhadolc as class representatives, and Plaintiffs law firm as class counsel. The class is defined as: All persons, excluding the Defendants and other individuals who are or may be liable for the conduct described in this Complaint, who were or are participants or beneficiaries of the Plan and who were, are, or may have been affected by the conduct set forth in the Second Amended Complaint. 133 (ake) (Entered: 7/1/09)

7/2/09 287 OPPOSITION to MOTION for Summary Judgment 146 *Response to Defendants' Notice of Supplemental Authority in Support of Their Motion for Summary Judgment* filed by Plaintiffs Henry Runowiecki, [et al.]. (Attachments: #1 Exhibit 1) (Wolff, Nelson) (Entered: 7/2/09)

* * *

7/7/09 293 SEALED DOCUMENT – Exhibit 1 of Plaintiffs' Motion to Amend Order

Granting Class Certification. (mat) (Entered: 7/9/09)

* * *

7/16/09 295 ORDER DENYING PLAINTIFFS MOTION FOR SUMMARY JUDGMENT; ORDER GRANTING DEFENDANTS MOTION FOR SUMMARY JUDGMENT IN PART: For the reasons stated above, Plaintiffs Motion for Partial Summary Judgment is DENIED. Defendants Motion for Summary Judgment is GRANTED with regard to all claims except (1) Plaintiffs prohibited transaction claims arising out of State Streets retention of float, and (2) whether the Defendant fiduciaries breached their duty of loyalty by choosing retail mutual funds in order to maximize the amount of revenue sharing at the expense of the Plan participants. Plaintiffs are ORDERED to file a supplemental brief further detailing their prohibited transaction claims based on State Streets retention of float. Plaintiffs shall identify with specificity the transactions at issue and which fiduciary was allegedly responsible for such conduct. Plaintiffs supplemental brief shall not exceed seven (7) pages and shall be filed by noon on July 24, 2009. Defendants shall file a seven page (7) response brief by July 29, 2009. The parties shall not submit any additional evidence but must cite with specificity to the record already

before the Court. IT IS SO ORDERED by Judge Stephen V Wilson: granting 146 186 Motion for Partial Summary Judgment (pj) (Entered: 7/16/09)

7/16/09 296 TRANSCRIPT for proceedings held on 6/22/09 1:30 PM. Court Reporter: Deborah K. Gackle, phone number (213) 620-1149. Transcript may be viewed at the court public terminal or purchased through the Court Reporter before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER. Notice of Intent to Redact due within 7 days of this date. Redaction Request due 8/6/09. Redacted Transcript Deadline set for 8/16/09. Release of Transcript Restriction set for 10/14/09. (Gackle, Deborah) (Entered: 7/16/09)

* * *

7/24/09 298 SUPPLEMENT to MOTION for Partial Summary Judgment as to Liability 186 *Supplemental Brief Pursuant to the Court's July 16, 2009 Order* filed by Plaintiffs Henry Runowiecki, [et al.]. (Wolff, Nelson) (Entered: 7/24/09)

* * *

7/24/09 300 NOTICE OF MOTION AND MOTION to Amend Order on Motion to Certify Class Action, 286 filed by Plaintiff Henry Runowiecki, [et al.]. Motion set for hearing on 8/17/09 at 1:30 PM

before Judge Stephen V. Wilson. (Wolff, Nelson) (Entered: 7/24/09)

* * *

7/29/09 302 SUPPLEMENT to MOTION for Summary Judgment 146/*Defendants' Supplemental Brief Pursuant To July 16, 2009 Order (Docket No. 295)* filed by Defendants Edison International, [et al.]. (Attachments: #1 Proof of Service) (Eccles, Robert) (Entered: 7/29/09)

7/31/09 303 ORDER by Judge Stephen V Wilson, Defendants Motion for Summary Judgment is GRANTED with respect to all claims arising out of State Streets retention of float. Defendants Motion is DENIED, however, with regard to the reasonableness of the fees charged to the Money Market fund. The Court sets a bench trial for October 13, 2009, at 9:00 am. The pretrial conference will be held on October 5, 2009, at 3:30 pm. (pj) (Entered: 8/3/09)

8/3/09 304 OPPOSITION re: MOTION to Amend Order on Motion to Certify Class Action, 286 MOTION to Amend Order on Motion to Certify Class Action, 286 300 filed by Defendants Edison International, [et al.]. (Attachments: #1 Proof of Service) (Eccles, Robert) (Entered: 8/3/09)

8/3/09 305 SEALED DOCUMENT – Exhibit 1 of Plaintiffs' Motion to Amend Order

Granting Class Certification. (mat) (Entered: 8/6/09)

* * *

8/10/09 307 REPLY in support MOTION to Amend Order on Motion to Certify Class Action, 286 MOTION to Amend Order on Motion to Certify Class Action, 286 300 filed by Plaintiffs Henry Runowiecki, [et al.]. (Wolff, Nelson) (Entered: 8/10/09)

8/17/09 309 MINUTES of Motion Hearing held before Judge Stephen V. Wilson: Proceedings: Plaintiff's Motion to Amend Order Granting Class Certification 300. The motion is granted. Court Reporter: Deborah Gackle. (mg) Modified on 8/19/09 (mg). (Entered: 8/19/09)

8/18/09 308 IN CHAMBERS ORDER GRANTING PLAINTIFFS' MOTION TO AMEND ORDER GRANTING CLASS CERTIFICATION by Judge Stephen V. Wilson: Having reviewed the parties' submissions, the Court rules as follows: Plaintiffs' Motion to Amend the Order Granting Class Certification is hereby GRANTED. The Order Granting Plaintiffs' Motion for Class Certification issued by this Court on July 30, 2009 is amended to add as additional class representatives named Plaintiffs William Izral, Henry Runowiecki, and Hugh Tinman, Jr. 300 (ake) (Entered: 8/18/09)

* * *

9/10/09	318	MINUTES (IN CHAMBERS): ORDER by Judge Stephen V. Wilson: Plaintiffs' ex parte application for relief from the 21-day requirement of Local Rule 7-3 is GRANTED. Plaintiffs' Motion to Revise Summary Judgment Order is ORDERED filed onto the docket. Plaintiffs' Motion to Revise Summary Judgment Order is DENIED. In substance if not in name, Plaintiffs' motion is a Motion for Reconsideration. Under Local Rule 7-18, a Motion for Reconsideration may be made on the following grounds: (a) a material difference in fact or law from that presented to the Court before such decision that in the exercise of reasonable diligence could not have been known to the party moving for reconsideration at the time of such decision, or (b) the emergence of new material facts or a change of law occurring after the time of such decision, or (c) a manifest showing of a failure to consider material facts presented to the Court before such decision. Plaintiffs' Motion fails to satisfy any of these criteria. 310 Ex 317 (pj) (Entered: 9/16/09)

* * *

9/14/09	314	MEMORANDUM of CONTENTIONS of FACT and LAW filed by Plaintiff Henry Runowiecki, [et al.]. (Wolff, Nelson) (Entered: 9/14/09)

* * *

9/14/09	316	Revised MEMORANDUM of CONTENTIONS of FACT and LAW filed by Defendants Edison International, [et al.]. (Eccles, Robert) (Entered: 9/14/09)
9/15/09	317	NOTICE OF MOTION AND MOTION to REVISE Summary Judgment Order filed by Plaintiffs Henry Runowiecki, [et al.]. Motion set for hearing on 9/28/09 at 1:30 PM before Judge Stephen V. Wilson. (pj) (Entered: 9/16/09)

* * *

10/1/09	322	TRIAL BRIEF *Pursuant to L.R. 16-10* filed by Defendants Edison International, [et al.]. (Attachments: #1 Proof of Service) (Eccles, Robert) (Entered: 10/1/09)
10/1/09	323	TRIAL BRIEF filed by Plaintiff Henry Runowiecki, [et al.]. (Wolff, Nelson) (Entered: 10/1/09)

* * *

10/5/09	341	NOTICE OF LODGING filed / (Defendants' Proposed) Findings Of Fact and Conclusions Of Law re Memorandum of Contentions of Fact and Law, 316 (Attachments: #1 (Defendants' Proposed) Findings Of Fact and Conclusions Of Law, #2 Proof Of Service) (Eccles, Robert) (Entered: 10/5/09)
10/5/09	342	NOTICE OF LODGING filed Plaintiffs' Proposed Findings of Fact and

Conclusions of Law re Memorandum of Contentions of Fact and Law 314 (Attachments: #1 Proposed Order Plaintiffs' Proposed Findings of Fact and Conclusions of Law) (Wolff, Nelson) (Entered: 10/5/09)

* * *

10/20/09 370 MINUTES OF COURT TRIAL – DAY ONE held before Judge Stephen V. Wilson. Opening statements made. Witnesses called, sworn and testified. Exhibits identified and admitted. The trial is continued to October 21, 2009 at 9:00 a.m. Court Reporter: Deborah Gackle and Maria Bustillos. (ake) (Entered: 10/29/09)

10/21/09 371 MINUTES OF COURT TRIAL – DAY TWO held before Judge Stephen V. Wilson: Witnesses called, sworn and testified. Exhibits identified and admitted. The trial is continued to October 22, 2009 9:00 a.m. Court Reporter: Deborah Gackle and Maria Bustillos. (ake) (Entered: 10/29/09)

10/22/09 372 MINUTES OF COURT TRIAL – DAY THREE AND FINAL held and completed before Judge Stephen V. Wilson. Closing arguments made. The Court invites further briefing. Defendant opening brief due 11/19/09. Plaintiff's response due 12/17/09. Defendant's reply due 01/07/09. Further hearing set for 1/25/10 at 1:30 p.m. Court Reporter: Deborah

Gackle and Maria Bustillos. (ake) (Entered: 10/29/09)

* * *

10/26/09 369 IN CHAMBERS ORDER REGARDING OUTSTANDING ISSUES FOR TRIAL held before Judge Stephen V. Wilson: On October 20-22, 2009, the above-captioned matter proceeded in a bench trial before this Court. In light of the evidence and argument presented during trial, the Court found sufficient reason to conform Plaintiffs' pleadings to the proof submitted and to allow Plaintiffs to proceed on both a theory of an alleged violation of the duty of loyalty under ERISA and an alleged violation of the duty of prudence under ERISA with regard to Plaintiffs' first claim for Defendants' alleged improper selection of certain mutual fund share classes for its 401(k) Plan. Defendants' counsel indicated to the Court that it would need to submit additional evidence to defend against an alleged violation of the duty of prudence, as initially only the duty of loyalty was at issue. The Court will permit supplemental evidence from both parties concerning Defendants' alleged violation of the duty of prudence. (ake) (Entered: 10/27/09)

* * *

11/14/09 375 TRANSCRIPT for proceedings held on 10/20/09 9:00 A.M. Court Reporter:

Deborah K. Gackle, phone number (213) 620-1149. Transcript may be viewed at the court public terminal or purchased through the Court Reporter before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER or Court Reporter: Deborah K. Gackle. Notice of Intent to Redact due within 7 days of this date. Redaction Request due 12/5/09. Redacted Transcript Deadline set for 12/15/09. Release of Transcript Restriction set for 2/12/10. (Gackle, Deborah) (Entered: 11/14/09)

11/14/09 376 TRANSCRIPT for proceedings held on 10/20/09 3:30 P.M. Vol. III of III. Court Reporter: Deborah K. Gackle, phone number (213) 620-1149. Transcript may be viewed at the court public terminal or purchased through the Court Reporter before the deadline for Release of Transcript Restriction. After that date it may be obtained through Court Reporter: Deborah K. Gackle or PACER. Notice of Intent to Redact due within 7 days of this date. Redaction Request due 12/5/09. Redacted Transcript Deadline set for 12/15/09. Release of Transcript Restriction set for 2/12/10. (Gackle, Deborah) (Entered: 11/14/09)

11/14/09 377 TRANSCRIPT for proceedings held on 10/21/09 3:30 P.M. Vol. III of III. Court Reporter: Deborah K. Gackle, phone number (213) 620-1149. Transcript may be viewed at the court

public terminal or purchased through the Court Reporter before the deadline for Release of Transcript Restriction. After that date it may be obtained through Court Reporter: Deborah K. Gackle or PACER. Notice of Intent to Redact due within 7 days of this date. Redaction Request due 12/5/09. Redacted Transcript Deadline set for 12/15/09. Release of Transcript Restriction set for 2/12/10. (Gackle, Deborah) (Entered: 11/14/09)

11/14/09 378 TRANSCRIPT for proceedings held on 10/22/09 9:45 A.M. Vol. I of I. Court Reporter: Deborah K. Gackle, phone number (213) 620-1149. Transcript may be viewed at the court public terminal or purchased through the Court Reporter before the deadline for Release of Transcript Restriction. After that date it may be obtained through Court Reporter: Deborah K. Gackle PACER. Notice of Intent to Redact due within 7 days of this date. Redaction Request due 12/5/09. Redacted Transcript Deadline set for 12/15/09. Release of Transcript Restriction set for 2/12/10. (Gackle, Deborah) (Entered: 11/14/09)

11/16/09 379 TRANSCRIPT for proceedings held on 10/21/09 9:15 AM. Vol. I of III, Court Reporter: Deborah K. Gackle, phone number (213) 620-1149. Transcript may be viewed at the court public terminal or purchased through the Court Reporter before the deadline for

Release of Transcript Restriction. After that date it may be obtained through COURT REPORTER DEBORAH K. GACKLE OR PACER. Notice of Intent to Redact due within 7 days of this date. Redaction Request due 12/7/09. Redacted Transcript Deadline set for 12/17/09. Release of Transcript Restriction set for 2/14/10. (Gackle, Deborah) (Entered: 11/16/09)

* * *

11/19/09 381 SUPPLEMENTAL BRIEF filed by Defendants Edison International, [et al.]. / *Pursuant to the Court's October 26, 2009 Order* regarding Minutes of In Chambers Order/Directive – no proceeding held, 369. (Attachments: #1 Declaration Supplemental Declaration of Marvin Tong In Support of Defendants' Supplemental Brief, #2 Declaration Supplemental Declaration of Diane Kobashigawa in Support of Defendants' Supplemental Brief) (Eastus, Matthew) (Entered: 11/19/09)

11/19/09 382 DECLARATION of David E. Ertel re Brief (non-motion non-appeal), Brief (non-motion non-appeal), Brief (non-motion non-appeal) 381 / *Supplemental Declaration in Support of Defendants' Supplemental Brief Pursuant to the Court's October 26, 2009 Order* filed by Defendants Edison International, [et al.]. (Eastus, Matthew) (Entered: 11/19/09)

11/19/09 383 DECLARATION of Daniel J. Esch re Brief (non-motion non-appeal), Brief (non-motion non-appeal), Brief (non-motion non-appeal) 381 / *Declaration Of Expert Witness Daniel J. Esch* filed by Defendants Edison International, [et al.]. (Attachments: #1 Exhibit A To D.J. Esch Declaration, #2 Exhibit B To D.J. Esch Declaration, #3 Exhibit C Part 1 of 2 To D.J. Esch Declaration, #4 Exhibit C Part 2 of 2 To D.J. Esch Declaration, #5 Exhibit D Part 1 of 3 To D.J. Esch Declaration, #6 Exhibit D Part 2 of 3 To D.J. Esch Declaration, #7 Exhibit D Part 3 of 3 To D.J. Esch Declaration) (Eccles, Robert) (Entered: 11/19/09)

11/19/09 384 DECLARATION of Matthew Eastus re Brief (non-motion non-appeal), Brief (non-motion non-appeal), Brief (non-motion non-appeal) 381 filed by Defendants Edison International, [et al.]. (Attachments: #1 Exhibit A to Eastus Declaration, #2 Declaration B ro Eastus Declaration, #3 Exhibit C to Eastus Declaration, #4 Declaration D Part 1 to Eastus Declaration, #5 Exhibit D Part 2 to Eastus Declaration, #6 Exhibit D Part 3 to Eastus Declaration, #7 Exhibit E to Eastus Declaration, #8 Exhibit F to Eastus Declaration, #9 Exhibit G to Eastus Declaration, #10 Declaration H to Eastus Declaration, #11 Exhibit I to Eastus Declaration, #12 Exhibit J to Eastus Declaration, #13 Exhibit K to

Eastus Declaration) (Eastus, Matthew) (Entered: 11/19/09)

11/19/09 385 DECLARATION of John W. Peavy III re Brief (non-motion non-appeal), Brief (non-motion non-appeal), Brief (non-motion non-appeal) 381 / *Declaration Of Expert Witness John W. Peavy III* filed by Defendants Edison International, [et al.]. (Attachments: #1 Exhibit 1 To J.W. Peavy Declaration, #2 Exhibit 2 To J.W. Peavy Declaration, #3 Exhibit 3 To J.W. Peavy Declaration, #4 Exhibit 4 To J.W. Peavy Declaration, #5 Exhibit 5 Part 1 of 6 To J.W. Peavy Declaration, #6 Exhibit 5 Part 2 of 6 To J.W. Peavy Declaration, #7 Exhibit 5 Part 3 of 6 To J.W. Peavy Declaration, #8 Exhibit 5 Part 4 of 6 To J.W. Peavy Declaration, #9 Exhibit 5 Part 5 of 6 To J.W. Peavy Declaration, #10 Exhibit 5 Part 6 of 6 To J.W. Peavy Declaration, #11 Exhibit 6 To J.W. Peavy Declaration, #12 Exhibit 7 Part 1 of 5 To J.W. Peavy Declaration, #13 Exhibit 7 Part 2 of 5 To J.W. Peavy Declaration, #14 Exhibit 7 Part 3 of 5 To J.W. Peavy Declaration, #15 Exhibit 7 Part 4 of 5 To J.W. Peavy Declaration, #16 Exhibit 7 Part 5 of 5 To J.W. Peavy Declaration, #17 Exhibit 8 To J.W. Peavy Declaration) (Eccles, Robert) (Entered: 11/19/09)

11/19/09 386 DECLARATION of Matthew Eastus re Brief (non-motion non-appeal), Brief (non-motion non-appeal), Brief

(non-motion non-appeal) 381 filed by Defendants Edison International, [et al.]. (Attachments: #1 Exhibit A to Eastus Declaration, #2 Exhibit B to Eastus Declaration, #3 Exhibit C to Eastus Declaration, #4 Exhibit D Part 1 to Eastus Declaration, #5 Exhibit D Part 2 to Eastus Declaration, #6 Exhibit D Part 3 to Eastus Declaration, #7 Exhibit D Part 4 to Eastus Declaration, #8 Exhibit E to Eastus Declaration, #9 Exhibit F to Eastus Declaration, #10 Exhibit G to Eastus Declaration, #11 Exhibit H to Eastus Declaration, #12 Exhibit I to Eastus Declaration, #13 Exhibit J of Eastus Declaration, #14 Exhibit K of Eastus Declaration) (Eastus, Matthew) (Entered: 11/19/09)

* * *

12/17/09 388 OBJECTIONS to Brief (non-motion non-appeal), Brief (non-motion non-appeal), Brief (non-motion non-appeal) 381 *Plaintiffs' Objections to Supp. Decl. of Marvin Tong* filed by Plaintiffs Henry Runowiecki, [et al.]. (Kelly, Jason) (Entered: 12/17/09)

12/17/09 389 OBJECTIONS to Brief (non-motion non-appeal), Brief (non-motion non-appeal), Brief (non-motion non-appeal) 381 *Plaintiffs' Objections to Supp. Decl. of Diane Kobashigawa* filed by Plaintiffs Henry Runowiecki, [et al.]. (Kelly, Jason) (Entered: 12/17/09)

12/17/09 390 OBJECTIONS to Declaration (non-motion), Declaration (non-motion), Declaration (non-motion) 382 *Plaintiffs' Objections to Supp. Decl. of David Ertel* filed by Plaintiffs Henry Runowiecki, [et al.]. (Kelly, Jason) (Entered: 12/17/09)

12/17/09 391 OBJECTIONS to Declaration (non-motion), Declaration (non-motion), Declaration (non-motion), Declaration (non-motion) 383 *Plaintiffs' Objections to Supp. Decl. of Daniel Esch* filed by Plaintiffs Henry Runowiecki, [et al.]. (Kelly, Jason) (Entered: 12/17/09)

12/17/09 392 OBJECTIONS to Declaration (non-motion), Declaration (non-motion), Declaration (non-motion), Declaration (non-motion), Declaration (non-motion), Declaration (non-motion) 385 *Plaintiffs' Objections to Supp. Decl. of John Peavy* filed by Plaintiffs Henry Runowiecki, [et al.]. (Kelly, Jason) (Entered: 12/17/09)

12/17/09 393 RESPONSE filed by Plaintiffs Henry Runowiecki, [et al.] to Brief (non-motion non-appeal), Brief (non-motion non-appeal), Brief (non-motion non-appeal) 381 Pltfs. Resp. to Defs. Supp. Brief (Kelly, Jason) (Entered: 12/17/09)

1/7/10 394 REPLY filed by Defendants Edison International, [et al.] to Minutes of In Chambers Order / Directive – no proceeding held, 369 / Supplemental Reply Brief Pursuant to October 26,

2009 Order (Eccles, Robert) (Entered: 1/7/10)

1/7/10 395 RESPONSE filed by Defendants Edison International, [et al.] to Objections – non-motion, 390, Minutes of In Chambers Order / Directive – no proceeding held, 369, Objections – non-motion, 391, Objections – non-motion, 389, Objections – non-motion, 388 , Objections – non-motion, 392 / *Defendants' Responses To Plaintiffs' Objections to Defendants' Declarations In Support of Defendants' Supplemental Brief Pursuant To the Court's October 26, 2009 Order* (Eccles, Robert) (Entered: 1/7/10)

* * *

2/17/10 399 NOTICE Supplemental Authority filed by Defendants Edison International, [et al.]. (Attachments: #1 Exhibit A to Defendants' Notice of Supplemental Authority) (Eastus, Matthew) (Entered: 2/17/10)

2/18/10 400 RESPONSE filed by Plaintiffs William Bauer, [et al.], to Notice (Other), Notice (Other) 399 (Kelly, Jason) (Entered: 2/18/10)

* * *

4/7/10 402 RESPONSE filed by Plaintiffs William Bauer, [et al.], to Minutes of In Chambers Order / Directive – no proceeding held, Set Deadlines / Hearings, 401 (Attachments: #1 Exhibit 1 – Depo of Daniel Esch, #2 Exhibit 2 –

Declaration of Steve Pomerantz) (Wolff, Nelson) (Entered: 4/7/10)

4/14/10 403 RESPONSE filed by Defendants Edison International, [et al.] to Minutes of In Chambers Order/Directive – no proceeding held, Set Deadlines / Hearings, 401 / Defendants' Responsive Brief Pursuant to February 24, 2010 Order (Attachments: #1 Declaration Supplemental Declaration of Expert Witness John W. Peavy III, #2 Exhibit 4 to Peavy Supplemental Declaration, #3 Declaration Of Matthew P. Eastus Re: Defendants' Responsive Brief Pursuant to February 24, 2010 Order, #4 Exhibit A to Eastus Declaration, #5 Exhibit B to Eastus Declaration, #6 Defendant's Evidentiary Objections to the Rebuttal Declaration of Steven Pomerantaz, Ph.D. and Attached Exhibits) (Eccles, Robert) (Entered: 4/14/10)

4/27/10 404 MINUTES OF POST COURT TRIAL HEARING held before Judge Stephen V. Wilson. The matter is submitted. Order to issue. Court Reporter: Deborah Gackle. (kbr) (Entered: 4/30/10)

7/8/10 405 FINDINGS OF FACT AND CONCLUSIONS OF LAW signed by Judge Stephen V. Wilson. Plaintiffs shall submit a proposed judgment consistent with this Order (and the updated damage calculations), and consistent with the Court's prior rulings on

Defendants motion for summary judgment issued on July 16, 2009 and July 31, 2009, within 20 days of the date of this Order. (pj) (Entered: 7/12/10)

7/28/10 406 Damages Calculations Pursuant to Court's Findings filed by Plaintiffs William Bauer, [et al.] re: Findings of Fact & Conclusions of Law, 405 (Kelly, Jason) (Entered: 7/28/10)

7/28/10 407 NOTICE OF LODGING filed *[Proposed] Order of Judgment* re Findings of Fact & Conclusions of Law, 405 (Attachments: #1 Proposed Order) (Kelly, Jason) (Entered: 7/28/10)

7/30/10 408 TRANSCRIPT for proceedings held on 4/27/10 11:40 A.M. Court Reporter: Deborah K. Gackle, phone number (213) 620-1149. Transcript may be viewed at the court public terminal or purchased through the Court Reporter before the deadline for Release of Transcript Restriction. After that date it may be obtained through COURT REPORTER DEBORAH K. GACKLE OR PACER. Notice of Intent to Redact due within 7 days of this date. Redaction Request due 8/20/10. Redacted Transcript Deadline set for 8/30/10. Release of Transcript Restriction set for 10/28/10. (Gackle, Deborah) (Entered: 7/30/10)

8/4/10 409 OBJECTIONS to Notice of Lodging 407 / *Defendants' Objections To Proposed Order Of Judgment* filed by

Defendants Edison International, [et al.]. (Eccles, Robert) (Entered: 8/4/10)

8/4/10 410 NOTICE OF LODGING filed re Findings of Fact & Conclusions of Law, 405 (Attachments: #1 [Proposed Alternative] Order of Judgment) (Eccles, Robert) (Entered: 8/4/10)

8/6/10 411 RESPONSE filed by Plaintiffs William Bauer, [et al.] to Objections – non-motion, 409 (Attachments: #1 Exhibit 1) (Kelly, Jason) (Entered: 8/6/10)

8/9/10 412 ORDER by Judge Stephen V. Wilson, regarding Plaintiffs' and Defendants Proposed Judgments 407, 411. The Court agrees with Defendants. At trial, Plaintiffs challenged Defendants' investments in the retail share classes rather than institutional share classes of six specific mutual funds. Plaintiffs did not challenge the Defendants' investment process more generally, and the Court made no ruling that Defendants' investment process was generally imprudent. Further, the Court did not conclude that the breaches of the duty of prudence with regard to the MFS Total Return Fund, the William Blair Fund, and the PIMCO Fund were part of an endemic, system-wide failure or even that they were typical of Defendants' general investment pattern. For these reasons, the Court will not order affirmative injunctive relief with regard to mutual fund investments that were

not specifically challenged by Plaintiffs in this dispute. The Court will, however, order that Defendants transfer the retail shares of the William Blair Small Cap Growth Fund to institutiona[1] shares. (jp) (Entered: 8/10/10)

8/9/10 413 ORDER OF JUDGMENT by Judge Stephen V. Wilson. Judgment is hereby entered in favor of the Plaintiff class on behalf of the Edison 401(k) Savings Plan against all Defendants, jointly and severally, in the amount of $370,732. Absent a timely appeal and the filing of a supersedeas bond in accordance with Federal Rule of Civil Procedure 62(d), the judgment amount shall be deposited into the Plan's Trust within 30 days from the date of the entry of this Judgment and distributed to the participants who invested in the retail class shares of the MFS Total Return Fund, the William Blair Small Cap Growth Fund, and the PICMO (Allianz) RCM Global Technology Fund from July 2002 to the present within 60 days of the date of the entry of this Judgment. (MD JS-6, Case Terminated). (jp) Modified on 8/10/10 (jp). (Entered: 8/10/10)

* * *

9/7/10 422 NOTICE OF APPEAL to the 9th CCA filed by Plaintiffs William Bauer, [et al.] Appeal of Order on Motion for

Summary Judgment, Order on Motion for Partial Summary Judgment, 295, Order, 412, Findings of Fact & Conclusions of Law, 405, Judgment, 413, Order, Set/Reset Deadlines/Hearings, 303 (Appeal fee of $455 receipt number 0973-7482896 paid.) (Attachments: #1 Exhibit Doc. 295, #2 Exhibit Doc. 303, #3 Exhibit Doc. 405, #4 Exhibit Doc. 412, #5 Exhibit Doc. 413) (Schlichter, Jerome) (Entered: 9/7/10)

* * *

9/8/10 428 NOTICE OF APPEAL to the 9th CCA filed by Defendants Edison International, [et al.]. Appeal of Findings of Fact & Conclusions of Law, 405, Judgment, 413 (Appeal fee of $455 receipt number 0973-7490733 paid.) (Attachments: #1 Exhibit A to the Notice of Appeal, #2 Exhibit B to the Notice of Appeal, #3 Representation Statement, #4 Certificate of Service re Representation Statement) (Eccles, Robert) (Entered: 9/8/10)

9/8/10 429 NOTIFICATION by Circuit Court of Appellate Docket Number 10-56406, 9th CCA regarding Notice of Appeal to 9th Circuit Court of Appeals 422. (dmap) Modified on 9/9/2010 (lr). (Entered: 9/9/10)

9/9/10 430 NOTIFICATION by Circuit Court of Appellate Docket Number 10-56415, 9th CCA regarding Notice of Appeal to 9th Circuit Court of Appeals, 428

as to Defendants Edison International, [et al.]. (lr) (Entered: 9/9/10)

* * *

8/12/13 480 MANDATE of 9th CCA filed re: Notice of Appeal to 9th Circuit Court of Appeals, 428, Notice of Appeal to 9th Circuit Court of Appeals, 422, CCA #10-56406, 10-56415. The Judgment of the district court is AFFIRMED. Mandate received in this district on 8/12/13. (car) (Entered: 8/14/13)

9/3/13 481 EX PARTE APPLICATION to Stay pending Disposition of Petition for Writ of Certiorari *or Amend the Judgment 413* filed by Defendants Edison International, [et al.]. (Attachments: #1 Memorandum in Support, #2 Declaration of Jonathan D. Hacker in Support, #3 Proposed Stay of Judgment, #4 Proposed Amended Judgment) (Eccles, Robert) (Entered: 9/3/13)

9/6/13 482 STAY OF JUDGMENT by Judge Stephen V Wilson: Pursuant to Federal Rule of Civil Procedure 62(d), the judgment in this case is stayed pending the disposition of any petition for a writ of certiorari filed by defendants Edison International et al., including any subsequent proceedings on the writ if granted. If defendants do not file a petition for a writ of certiorari, this stay will expire as of the deadline

for filing such a petition. 481 (pj) (Entered: 9/6/13)

1/15/14 483 SATISFACTION OF JUDGMENT filed by Defendants Edison International, [et al.]. (Attachments: #1 Declaration of Matthew P. Eastus in Support of) (Eastus, Matthew) (Entered: 1/15/14)

* * *

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 10-56406

GLENN TIBBLE, AS REPRESENTATIVE OF A CLASS OF SIMILARLY SITUATED PERSONS, AND ON BEHALF OF THE PLAN, ET AL.,
Plaintiffs-Appellants,

v.

EDISON INTERNATIONAL, ET AL.,
Defendants-Appellees.

Date Filed	#	Docket Text
9/8/10	1	DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL. SEND MQ: Yes. The schedule is set as follows: Mediation Questionnaire due on 9/15/10. Transcript ordered by 10/7/10. Transcript due 1/5/11. Appellant William Bauer, Appellant William Izral, Appellant Henry Runowiecki, Appellant Frederick Suhadolc, Appellant Glenn Tibble and Appellant Hugh Tinman Jr. opening brief due 2/14/11. Appellee Edison International, Appellee Edison International Trust Investment Committee, Appellee Manager of Southern California Edison's HR Service Center, Appellee Secretary of the Edison International Benefits Committee, Appellee South-

ern California Edison's Vice President of Human Resources and Appellee The Edison International Benefits Committee answering brief due 3/16/11. Appellant's optional reply brief is due 14 days after service of the answering brief. [7467078] (JN)

* * *

9/9/10 3 DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL IN CROSS-APPEAL. SEND MQ: Yes. Setting cross-appeal briefing schedule as follows: Mediation Questionnaire due on 9/16/10. First cross appeal brief due 2/14/11 for William Bauer, William Izral, Henry Runowiecki, Frederick Suhadolc, Glenn Tibble and Hugh Tinman Jr. Second brief on cross appeal due 3/16/11 for Edison International, Edison International Trust Investment Committee, Manager of Southern California Edison's HR Service Center, Secretary of the Edison International Benefits Committee, Southern California Edison's Vice President of Human Resources, The Edison International Benefits Committee, Secretary of the Southern California Edison Company Benefits Committee and The Southern California Edison Benefits Committee. Third brief on cross appeal due 4/15/11 for William Bauer, William Izral, Henry Runowiecki, Frederick Suhadolc, Glenn Tibble and Hugh Tinman Jr. Optional reply brief on

cross appeal due 14 days after service of third brief for cross-appellants [7467909] [10-56415, 10-56406] (FB)

* * *

4/20/11 14 Submitted (ECF) First Brief on Cross-Appeal brief for review. Submitted by Appellants William Bauer, [et al.] in 10-56406. Date of service: 4/20/11. [7724218] [10-56406, 10-56415] (MAW)

* * *

4/21/11 17 Filed Appellants William Bauer, [et al.] excerpts of record in 8 volumes. Served on 4/20/11. Volumes IV-VIII filed UNDER SEAL. [7726172] [10-56406, 10-56415] (WP)

* * *

4/27/11 20 Submitted (ECF) Amicus brief for review (by government or with consent per FRAP 29(a)). Submitted by AARP. Date of service: 4/27/11. [7731915] (JES)

* * *

5/25/11 24 Submitted (ECF) Amicus brief for review (by government or with consent per FRAP 29(a)). Submitted by Hilda L. Solis, Secretary of the United States Department of Labor. Date of service: 5/25/11. [7764849] [10-56406, 10-56415] (SEE)

* * *

7/25/11 30 Submitted (ECF) Second Brief on Cross-Appeal brief for review and

filed Motion to file oversized brief. Submitted by Appellees Edison International, [et al.] in 10-56406, Appellants Edison International, [et al.] in 10-56415. Date of service: 7/25/11. [7832433] [10-56406, 10-56415] – [COURT UPDATE: Replaced PDF of brief (now includes statement of related cases and contains exact word count in certificate of compliance). Resent NDA. 7/27/11 by DB] (BE)

* * *

7/26/11	35	Filed Appellees Edison International, Edison International Trust Investment Committee and Manager of Southern California Edison's HR Service Center, et al. excerpts of record in 12 volumes. Volumes 5-12 filed (UNDER SEAL) Served on 7/25/11. [7834151] [10-56406, 10-56415] (WP)

* * *

8/1/11	37	Submitted (ECF) Amicus brief for review (by government or with consent per FRAP 29(a)). Submitted by Investment Company Institute. Date of service: 8/1/11. [7839092] [10-56406, 10-56415] (TLC)
8/1/11	38	Submitted (ECF) Amicus brief for review (by government or with consent per FRAP 29(a)). Submitted by California Employment Law Council. Date of service: 8/1/11. [7839712] [10-56415, 10-56406] (NAD)

* * *

10/6/11	51	Submitted (ECF) Third Brief on Cross-Appeal brief for review and filed Motion to file oversized brief. Submitted by Appellants William Bauer, [et al.] in 10-56406, Appellees William Bauer, [et al.] in 10-56415. Date of service: 10/6/11. [7920012] [10-56406, 10-56415] (MAW)

* * *

10/7/11	53	Filed Appellants William Bauer, [et al.] excerpts of record in 3 volumes. Volume three filed under seal. Served on 10/6/11. [7923958] [10-56406, 10-56415] (WP)

* * *

12/5/11	59	Submitted (ECF) Cross-Appeal Reply Brief for review. Submitted by Appellees Edison International, [et al.] in 10-56406. Date of service: 12/5/11. [7988815] [10-56406, 10-56415] – [COURT UPDATE: Edited docket text to reflect the correct type of brief. Resent NDA. 12/6/11 by DB] (BE)

* * *

12/6/11	61	Filed Appellees Edison International and Edison International Trust Investment Committee excerpts of record in 7 volumes. Volumes 3-6 filed UNDER SEAL. Served on 12/6/11. [7990904] [10-56406, 10-56415] (WP)

* * *

3/5/12	65	Filed (ECF) Appellees William Bauer, [et al.] in 10-56415 citation of supple-

mental authorities. Date of service: 3/5/12. [8090079] [10-56415, 10-56406] (MAW)

* * *

10/25/12 72 Filed (ECF) Appellees Edison International, [et al.] in 10-56406, Appellants Edison International, [et al.] in 10-56415 citation of supplemental authorities. Date of service: 10/25/12. [8377259] [10-56406, 10-56415] (JH)

10/29/12 73 Filed (ECF) Appellants William Bauer, [et al.] in 10-56406, Appellees William Bauer, [et al.] in 10-56415 citation of supplemental authorities. Date of service: 10/29/12. [8379692] [10-56406, 10-56415] (MAW)

* * *

11/6/12 79 ARGUED AND SUBMITTED TO ALFRED T. GOODWIN, DIARMUID F. O'SCANNLAIN and JACK ZOUHARY. [8389707] [10-56406, 10-56415, 11-56628] (LN)

1/16/13 80 Filed (ECF) Appellees Edison International, [et al.] in 10-56406, Appellants Edison International, [et al.] in 10-56415 citation of supplemental authorities. Date of service: 1/16/13. [8477420] [10-56406, 10-56415] (JH)

1/22/13 81 Filed (ECF) Appellants William Bauer, [et al.] in 10-56406, Appellees William Bauer, [et al.] in 10-56415 citation of supplemental authorities. Date of service: 1/22/13. [8481062] [10-56406, 10-56415] (MAW)

3/21/13	82	FILED OPINION (ALFRED T. GOODWIN, DIARMUID F. O'SCANNLAIN and JACK ZOUHARY) AFFIRMED. The parties shall bear their own costs on appeal. Judge: ATG, Judge: DFO Authoring, Judge: JZ. FILED AND ENTERED JUDGMENT. [8559257] [10-56406, 10-56415] (PH)

* * *

4/4/13	86	Filed (ECF) Appellants William Bauer, [et al.] in 10-56406, Appellees William Bauer, [et al.] in 10-56415 petition for panel rehearing and petition for rehearing en banc (from 3/21/13 opinion). Date of service: 4/4/13. [8577864] [10-56406, 10-56415] – [COURT UPDATE: Attached 3/21/13 opinion. Resent NDA. 4/5/13 by RY] (PKS)
4/10/13	87	Filed (ECF) Amicus Curiae AARP Foundation Litigation in 10-56406 Correspondence: Letter in Support of Petition for Rehearing. Date of service: 4/10/13 [8583966] [10-56406, 10-56415] (JES)
4/12/13	88	Filed order (ALFRED T. GOODWIN, DIARMUID F O'SCANNLAIN and JACK ZOUHARY): Appellees/Cross-Appellants are directed to file a response to the petition for rehearing en banc filed with this court on April 4, 2013. The response shall not exceed 15 pages or 4200 words and shall be filed within 21 days of the date of this order. Parties who are registered

for ECF must file the response electronically. Parties who are not registered ECF filers must file the original response plus 50 paper copies. [8588736] [10-56406, 10-56415] (AF)

5/3/13 89 Filed (ECF) Appellees Edison International, [et al.] in 10-56406, Appellants Edison International, [et al.] in 10-56415 response to Combo PFR Panel and En Banc (ECF Filing), Combo PFR Panel and En Banc (ECF Filing) for panel and en banc rehearing, for panel and en banc rehearing (statistical entry). Date of service: 5/3/13. [8615705]. [10-56406, 10-56415] (JH)

5/6/13 90 Filed (ECF) Appellants William Bauer, [et al.] in 10-56406, Appellees William Bauer, [et al.] in 10-56415 Motion for miscellaneous relief [Motion for Leave to File Reply and Reply in Support of Petition for Panel Rehearing or Rehearing En Banc]. Date of service: 5/6/13. [8618372] [10-56406, 10-56415] (PKS)

5/6/13 91 Filed (ECF) Appellees Edison International, [et al.] in 10-56406, Appellants Edison International, [et al.] in 10-56415 Correspondence: Letter to Clerk re Response to the Petition for Rehearing or Rehearing En Banc. Date of service: 5/6/13 [8618373] [10-56406, 10-56415] (JH)

5/10/13 92 Filed (ECF) Appellees Edison International, [et al.] in 10-56406, Appel-

		lants Edison International, [et al.] in 10-56415 response opposing motion (motion for miscellaneous relief (to be used only if no other relief applies)). Date of service: 5/10/13. [8624162] [10-56406, 10-56415] (JH)
5/21/13	93	Filed order (ALFRED T. GOODWIN, DIARMUID F. O'SCANNLAIN and JACK ZOUHARY): Appellant's Opposed Motion to File Reply in Support of Petition for Panel Rehearing or Rehearing en banc is GRANTED. [8638276] [10-56406, 10-56415] (AF)
5/29/13	94	Filed (ECF) Appellants William Bauer, [et al.] in 10-56406, Appellees William Bauer, [et al.] in 10-56415 reply to, for panel and en banc rehearing, for panel and en banc rehearing (statistical entry). Date of service: 5/29/13. [8647512]. [10-56406, 10-56415] (PKS)
8/1/13	95	Filed order and amended opinion (ALFRED T. GOODWIN, DIARMUID F. O'SCANNLAIN and JACK ZOUHARY). The opinion filed March 21, 2013, and published at 711 F.3d 1061, is amended as follows: (See order for full text) An amended opinion is filed concurrently with this order. With these amendments, the panel has voted unanimously to deny the petition for rehearing. Judge O'Scannlain has voted to deny the petition for rehearing en banc, and Judges Goodwin and Zouhary have so recommended. The full court has

		been advised of the petition for rehearing en banc, and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35. The petition for rehearing and petition for rehearing en banc is DENIED. No further petitions for panel rehearing or for rehearing en banc will be entertained. Amending Disposition Opinion AFFIRMED. [8726034] [10-56406, 10-56415] (PH)
8/12/13	96	MANDATE ISSUED. (ATG, DFO and JZ) [8738911] [10-56406, 10-56415] (MT)
11/4/13	97	Received notice from the Supreme Court: petition for certiorari filed on 10/30/13. Supreme Court Number 13-550. [8849385] (RR)
10/3/14	98	Received Supreme Court order dated 10/2/14. The petition for a writ of certiorari is granted limited to the following question: "Whether a claim that ERISA plan fiduciaries breached their duty of prudence by offering higher-cost retail-class mutual funds to plan participants, even though identical lower-cost institution-class mutual funds were available, is barred by 29 U.S.C. § 1113(1) when fiduciaries initially chose the higher-cost mutual funds as plan investments more than six years before the claim was filed." Supreme Court No. 13-550 [9265786] (RR)

[Attorney Names & Addresses Omitted]

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Case No. CV 07-5359 SVW (AGRx)

GLENN TIBBLE, ET AL., INDIVIDUALLY AND AS REPRESENTATIVES OF SIMILARLY SITUATED PERSONS, AND ON BEHALF OF THE PLAN, ET AL.,
Plaintiffs,

v.

EDISON INTERNATIONAL, ET AL.,
Defendants.

SECOND AMENDED COMPLAINT FOR BREACH OF FIDUCIARY DUTY

JURY TRIAL DEMANDED ON ALL COUNTS SO TRIABLE

[Filed Apr. 15, 2009]

INTRODUCTION

1. In this action, pursuant to ERISA § 502(a), 29 U.S.C. § 1132(a), Plaintiffs and Class Representatives William Izral, William Bauer, Henry Runowiecki, Frederick Suhadloc, Glenn Tibble and Hugh Tinman, Jr., individually and on behalf of the Edison 401(k) Savings Plan (the "Plan") and similarly situated participants and beneficiaries of the Plan, seek to recover the financial losses suffered by the Plan and to obtain injunctive and other equitable relief for

the Plan from Edison International, Southern California Edison Company, the Plan Sponsor, the Edison International Benefits Committee, the Southern California Edison Benefits Committee (the "Committee"), the Plan Administrator, and other defendants identified below (collectively "Defendants"), based upon breaches of their fiduciary duties.

2. As set forth in detail below, Defendants: (A) while assuring participants that Southern California Edison paid the administrative costs of the Plan, surreptitiously caused such costs to be assessed against Plan participants' retirement savings; (B) squandered the Plan's enormous bargaining power, and impaired participants' ability to receive market returns, by including dozens of actively managed retail mutual funds as plan investment options; (C) subjected the Plan to excess and unreasonable fees and expenses collected by, and transferred among, Plan service providers as soft dollars to support undisclosed Revenue Sharing programs; (D) undermined participants' returns in the Edison International Stock Fund by imprudent fund management; (E) failed to employ a prudent process to ensure the appointment of qualified and competent individuals to the committees overseeing the plan; and (F) failed to monitor, among others, the committee members and activities of the Plan itself to ensure compliance their fiduciary obligations. By this and by other conduct set forth below, Defendants violated their fiduciary obligations under ERISA and caused damages to the Plan.

PARTIES, JURISDICTION AND VENUE

Plaintiffs:

3. Plaintiff and Class Representative William Bauer is a resident of Joliet, Illinois.

4. Plaintiff and Class Representative William Izral is a resident of Peotone, Illinois.

5. Plaintiff and Class Representative Henry Runowiecki is a resident of Elgin, Illinois.

6. Plaintiff and Class Representative Frederick Suhadolc is a resident of Elwood, Illinois.

7. Plaintiff and Class Representative Glenn Tibble is a resident of Joliet, Illinois.

8. Plaintiff and Class Representative Hugh Tinman, Jr., is a resident of New Lenox, Illinois.

9. Each Plaintiff and Class Representative is a participant in the Plan.

10. Each Plaintiff and Class Representative is a current or former employee of Midwest Generation, which is subsidiary of the Edison Mission Group. In turn, the Edison Mission Group is a division or subsidiary of Edison International.

11. Midwest Generation maintains its headquarters in Chicago, Illinois and operates its power plants in the Chicago area. Midwest Generation has approximately 1,200 employees.

Defendants:

12. Defendant Edison International is an electric power generator and distributor based in Rosemead, California. Edison International is the parent of Defendant Southern California Edison Company ("SCE"). Upon information and belief, pursuant to ERISA § 3(16)(B), Edison International serves as sponsor of the Plan either directly or through the named Plan Sponsor SCE, and functions as a fiduciary to the Plan through its appointment of individuals, either directly or through SCE, to various committees, and its monitoring of those individuals, committees, and the Plan itself.

13. Defendant SCE is an investor-owned utility company that provides electricity to retail customers in Southern California. Upon information and belief, SCE is the Sponsor of the Plan pursuant to ERISA § 3(16)(B), and functions as a fiduciary to the Plan through its appointment of individuals to various committees, and its monitoring of those individuals, committees, and the Plan itself.

14. In this Complaint, Edison International and Southern California Edison will collectively be referred to as "Edison."

15. Defendant Southern California Edison Benefits Committee (the "Committee") is a named fiduciary and Plan Administrator. The Committee is comprised of persons appointed by Southern California Edison's Chief Executive Officer, and serve at his pleasure. Each Member of the Committee is also a named fiduciary of the Plan.

16. Defendant the Edison International Trust Investment Committee (the "TIC"), either directly or through the TIC Chairman's Subcommittee, is a named fiduciary of the Plan. The TIC is comprised of persons appointed by the Chief Executive Officer of Edison International. Each Member of the TIC is also a named fiduciary of the Plan.

17. Defendant the Secretary of the Benefits Committee is a named fiduciary of the Plan. Pursuant to Edison's June 28, 2006 Form 11-K, in 2005 Mr. Aaron Whitely was the Secretary of the Benefits Committee.

18. Defendant Southern California Edison's Vice President, Human Resources is a named fiduciary of the Plan. Pursuant to Edison's Forms 11-K, this position has been held at various times by, among others, Diane Featherstone, Lillian Gorman Frank,

John Kelly, Frederick Grigsby, and J. Michael Mendez, who report to, and are appointed by, the CEO of SCE.

19. Defendant Manager of Southern California Edison's HR Service Center is a named fiduciary of the Plan. Upon information and belief, this position has been held for certain time periods by Christine DeNatale.

20. Southern California Edison indemnifies all of the foregoing Defendants, its employees, and members of its Board of Directors, against liability for their conduct as Plan fiduciaries.

Jurisdiction and Venue:

21. Plaintiffs bring this action pursuant to ERISA §§ 502(a)(2) & (3), 29 U.S.C. § 1132(a)(2) & (3), which provide that participants may pursue civil actions individually and on behalf of the Plan for damages to remedy breaches of fiduciary duty as set forth in ERISA § 409, 29 U.S.C. § 1109, and/or to obtain other appropriate equitable relief. This Court has federal question subject matter jurisdiction pursuant to 28 U.S.C. § 1331 and 29 U.S.C. § 1132(e)(1)(F).

22. All Defendants are subject to service of process issued from this Court pursuant to 29 U.S.C. § 1132(e)(2).

23. Venue is proper in this Court pursuant to 29 U.S.C. § 1132(e)(2) because the Plan is administered in this district and the Defendants may be found in this district.

Rule 23 Requires Class Certification:

24. Plaintiffs bring this action individually, pursuant to 29 U.S.C. § 1132(a)(2) and (a)(3), and pursuant to Rule 23 of the Federal Rules of Civil Procedure, on behalf of the Plan, themselves and all similarly situated Plan participants and beneficiaries.

The Plan is comprised of a unitary trust corpus in which each Plaintiff, and each Plan participant, has an interest. Plaintiffs seek to represent the following (the "Class"):

> All persons, *excluding the Defendants, and/or other individuals who are or may be liable for the conduct described in this Complaint*, who were or are participants or beneficiaries of the Plan and who were, are or may have been affected by the conduct set forth in this Complaint, as well as those who will become participants or beneficiaries of the Plan in the future.

25. Certification of this Class is proper under Rule 23(a) in that:

A. **Numerosity.** The members of the Class are so numerous that joinder of all members is impracticable. Although the Plaintiffs do not know the exact number of Class members as of the date of filing, the Plan's public documents state that, at the end of the 2005 Plan year, there were 17,395 participants with account balances in the Plan.

B. **Commonality.** Common issues of fact and law predominate over any issues unique to individual Class members. Issues that are common to all Class Members include, but are not limited to, whether the Defendants:

i. Failed to properly and prudently select plan investment options, made selections for self-interested reasons, and/or abdicated their responsibilities in this regard;

ii. Shifted to the Plan, and its participants and beneficiaries, Edison's obligation to pay the cost of administering the plan

including fees and expenses of the trustee and record keeper;

iii. Squandered the Plan's enormous bargaining leverage in the marketplace by including dozens of retail mutual funds as Plan investment options;

iv. Denied Plan participants and beneficiaries the opportunity to receive market returns over the long term and on a risk-adjusted basis by including within the plan high cost and underperforming, actively managed mutual funds;

v. Failed to monitor the committees overseeing the Plan in the committees' monitoring of performance;

vi. Failed to employ a proper process to appoint individuals with the knowledge and skill to determine, in view of overwhelming literature that actively managed mutual funds do not beat the market after fees, whether the funds chosen were likely to do so;

vii. Caused the Plan, and its participants and beneficiaries, to pay the high costs of active investment management that provided no benefit to their long-term retirement savings;

viii. Caused assets to be removed from the Plan, and the retirement savings of participants and beneficiaries, for the purpose of providing soft dollars to be used in undisclosed Revenue Sharing programs;

ix. Caused the Plan to pay for fees and expenses that were, or are, unreason-

able and/or not incurred solely for the benefit of Plan participants and beneficiaries;

x. Charged fees and expenses to the Plan that were, or are, unreasonable and/or not incurred solely for the benefit of Plan participants;

xi. Caused the Plan to pay fees and expenses that were, or are, unreasonable and/or not incurred solely for the benefit of Plan participants;

xii. Failed to monitor the fees and expenses paid by the Plan and, by such failure, caused or allowed the Plan to pay fees and expenses that were, or are, unreasonable and/or not incurred solely for the benefit of Plan participants;

xiii. Failed to capture Revenue Sharing monies and Additional Compensation Streams, as set forth below, for the benefit of the Plan;

xiv. Failed to inform themselves of, and understand, the various methods by which vendors in the 401(k), financial and retirement industry collect payments and other revenues from 401(k) plans;

xv. Failed to establish, implement, and follow procedures to properly and prudently determine whether the fees and expenses paid by the Plan were reasonable and incurred solely for the benefit of Plan participants;

xvi. Failed properly to inform, and/or disclose to, Plan participants the fees and

expenses that are, or have been, paid by the Plan;

xvii. Failed to inform, and/or disclose to, Plan participants in proper detail and clarity the transaction fees and expenses which affect participants' account balances in connection with the purchase or sale of interests in investment alternatives;

xviii. Breached their fiduciary duties by failing to disclose that hidden and excessive fees were and are being assessed against Plan assets, and by failing to stop such hidden excessive fees;

xix. In charging, causing to be charged or paid, and failing to monitor the fees and expenses of the Plan, failed to exercise the care, skill, prudence, and diligence that a prudent person would when acting in like capacity and familiar with such matters;

xx. Caused and/or allowed fees and expenses to be paid by the Plan for purposes other than those allowed by ERISA;

xxi. Failed to employ a prudent process in their appointment of, among others, Frederick Grigsby, Aaron Whitley, Diane Featherstone, J. Michael Mendez, John Kelly, and Lillian Gorman to the Committee, to ensure that these individuals had the necessary skills and qualifications to oversee and run the Plan for the best interests of the Plan participants;

xxii. Failed to properly monitor, through a prudent process, the performance of, among others, Frederick Grigsby, Aaron Whitley, Diane Featherstone, J. Michael Mendez, John Kelly, and Lillian Gorman to the Committee, to ensure these individuals were overseeing and running the Plan for the best interests of the Plan participants;

xxiii. By the conduct above and/or by other conduct set forth in this Complaint, revealed in discovery and/or proven at trial, breached their fiduciary and other ERISA-imposed obligations to the Plan, Plan participants, and members of the Class;

xxiv. Are liable to the Plan and the Class for losses suffered as a result of the breaches of their fiduciary and other ERISA-imposed obligations; and

xxv. Are responsible to account for the assets and transactions of the Plan and should be charged/surcharged for any transactions and payments for which they cannot account or which were not proper uses of Plan assets.

C. **Typicality.** The Plan is comprised of a unitary trust corpus in which each Plaintiff, and each Plan participant, has an interest. The claims brought by the Plaintiffs are typical of those of the absent Class members, in that:

i. The Defendants owed the exact same fiduciary and other ERISA-based obligations to each Plan participant and

beneficiary, and each member of the Class;

ii. The Defendants' breach of those obligations constitutes a breach to each participant and beneficiary, and each member of the Class;

iii. To the extent that there are any differences in Class members' damages, such differences would be a product of simple mathematics based upon account balances in the Plan. Such minimal and formulaic differences are no impediment to class certification.

D. **Adequacy of Representation.** The Plaintiffs are adequate representatives of the absent Class members and will protect such absent Class members' interests in this litigation. The Plaintiffs do not have any interests antagonistic to the other class members nor do they have any unique claims or defenses that might undermine the efficient resolution of the Class' claims. Plaintiffs have retained competent counsel, versed in ERISA, class actions, and complex litigation.

26. Class certification is also appropriate under Rule 23(b) and each subpart in that:

A. Pursuant to Rule 23(b)(1)(A), in the absence of certification, there is a risk of inconsistent adjudications with respect to individual class members;

B. Pursuant to Rule 23(b)(2), as set forth above, the Defendants have acted on grounds generally applicable to the Class as a whole; and

C. Pursuant to Rule 23(b)(3), as set forth above, common issues of law and fact predominate over any purely individual issues and thus a class action is superior to any other method for adjudicating these claims.

FACTS

The Plan

27. As part of their compensation and benefits, Edison offers certain of its employees the opportunity to participate in the Plan. The Plan is a "defined contribution plan," as defined in ERISA § 3(34), 29 U.S.C. § 1002(34), and contains or is part of an "eligible individual account plan" under ERISA § 407(d)(3)(A), 29 U.S.C. § 1107(d)(3)(A). It is also a tax-qualified plan of the type popularly known as a "401(k) plan."

28. All Plan assets are held in a Trust (the "Trust") established by SCE and the Plan's trustee. The fees and expenses of the Plan are paid from, and/or directly or indirectly reduce, the assets of the Trust. Plan participants and beneficiaries have an undivided beneficial interest in the Trust.

29. According to the Plan's financial statements filed with the Department of Labor, upon enrollment in the Plan, participants may direct their contributions in one or more of the following investment fund options:

As of December 31, 2005 and December 31, 2004, all participants were able to choose from among 47 and 48 investment fund offerings, respectively. As of December 31, 2005, these investment funds consisted of the following:

- Three Pre-Mixed Portfolios – Funds are invested in portfolios which include U.S. stocks, non-U.S. stocks and corporate and government bonds;

- Seven Institutional Funds – Funds are invested in a broad selection of asset classes; large and small U.S. stocks (including Edison International Common Stock), non-U.S. stocks and fixed income instruments; and
- Thirty Seven Mutual Funds – Funds are invested in a variety of retail mutual funds from multiple asset classes.

30. According to the Plan's financial statements filed with the Department of Labor:

> The Plan's investment in Edison International Common Stock amounted to approximately $1,324,221,000 and $922,975,000 as of December 31, 2005 and 2004, respectively. Such investments represented approximately 41 percent and 35 percent of the Plan's total assets as of December 31, 2005 and 2004, respectively.

31. If Plan participants do not designate upon enrollment the investment fund option into which his contributions are to be invested, all of their contributions and Edison's matching contributions are invested in the Edison International Stock Fund.

32. Edison is obligated to pay the cost of administering the Plan, and repeatedly has represented that it does so, in its Forms 11-K, filed with the Securities and Exchange Commission, stating that "[t]he Plan Sponsor pays the cost of administering the Plan, including the fees and expenses of the Trustee and record keeper."

33. In addition, the 2000 and 2001 Plan Document states that "[t]he cost of the administration of the Plan will be paid by the Company."

34. Further, according to the Plan's financial statements filed with the Department of Labor in 2003 (emphasis added):

Administrative and Investment Expenses

The Plan Sponsor pays the cost of administering the Plan, including fees and expenses of the Trustee and record keeper. **Such costs were not material to the Financial Statements of Plan taken as a whole for the year that ended December 31, 2003.** The fees, taxes and other expenses incurred by the Trustee or investment managers in making investments are paid out of the applicable fund. This includes brokerage fees for sales or purchases of Edison International Common Stock on the open market. No additional costs are incurred in connection with the sales of Edison International Common Stock within the trust or the transfer of assets between funds.

Mutual funds pay fees to the Plan record keeper for administrative services to participants that would otherwise have to be provided by the mutual funds. The majority of fees received by the Plan record keeper are used to reduce the record keeping and communication expenses of the Plan.

35. According to the Plan's financial statements filed with the Department of Labor in 2004:

Administrative and Investment Expenses

The Plan Sponsor pays the cost of administering the Plan, including fees and expenses of the Trustee and record keeper. The fees, taxes and other expenses incurred by the Trustee or investment managers in making investments are paid out of the applicable fund. This includes brokerage fees for sales or purchases of Edison International Common Stock on the open market. No additional costs are incurred in connection with

the sales of Edison International Common Stock within the trust or the transfer of assets between funds.

Mutual funds pay fees to the Plan record keeper for administrative services to participants that would otherwise have to be provided by the mutual funds. The majority of fees received by the Plan record keeper are used to reduce the record keeping and communication expenses of the Plan.

36. According to the Plan's financial statements filed with the Department of Labor in 2005 (emphasis added):

Administrative and Investment Expenses

The Plan Sponsor pays the cost of administering the Plan, including fees and expenses of the Trustee and record keeper. The fees, taxes and other expenses incurred by the Trustee or investment managers in making investments are paid out of the applicable fund. This includes brokerage fees for sales or purchases of Edison International Common Stock on the open market. No additional costs are incurred in connection with the sales of Edison International Common Stock within the trust or the transfer of assets between funds.

Mutual funds pay fees to the Plan record keeper for administrative services to participants that would otherwise have to be provided by the mutual funds. The majority of fees received by the Plan record keeper are used to reduce the record keeping and communication expenses of the Plan. **The return of these fees to the record keeper qualifies them as a party-in**

interest transaction. See Note 7 for a discussion of related party transactions.

37. At Note 7, "Related Party Transactions," the Plan's financial statements filed with the Department of Labor in 2005 states – for the very first time (emphasis added):

Related Party Transactions

The Money Market Fund was managed by State Street Bank and Trust Company, which also serves as the Plan's Trustee. As such, transactions in the Money Market Fund qualify as party-in-interest transactions. Fees earned by the Trustee in its capacity as fund manager for the Plan were $379,641 for 2005 and were reported as a reduction to investment income on the Statement of Changes in Net Assets Available for Plan Benefits.

The Plan's investment options include the Company's Common Stock as a fund option. State Street Global Advisors, an affiliate of State Street Bank and Trust Company, is the investment manager of the Edison International Common Stock Fund. As such, transactions in the Edison International Common Stock Fund qualify as party-in-interest transactions. Fees earned by State Street Global Advisors in its capacity as the investment manager of the Edison International Common Stock Fund were $158,436 for 2005 and were reported as a reduction to investment income on the Statement of Changes in Net Assets Available for Plan Benefits.

Various mutual funds refund to Hewitt Associates, the Plan's record keeper, certain marketing and communication (12-b1) fees they charge to investors in these funds. **Fees refunded to**

the record keeper were $1,214,795 for 2005 and were used to reduce the recordkeeping and communication expenses of the Plan incurred by the Plan Sponsor.

38. Plaintiffs are informed and believe that there has been no change over the past three years (or more) in the manner in which Mutual Funds "pay fees to the Plan record keeper for administrative services" – *i.e.* engage in Revenue Sharing, as discussed below.

39. Although Defendants have caused the Plan to undertake party-in-interest transactions for the last several years in connection with these mutual fund payments to the Plan record keeper, it first disclosed these party-in-interest transactions in mid-2006 (when Defendants filed the Plans' 2005 financial statements with the Department of Labor).

40. Moreover, although Defendants have repeatedly represented in the Plan's financial statements that Edison, as Plan Sponsor, "pays the cost of administering the Plan, including the fees and expenses of the Trustee and the record keeper," Defendants disclosures indicate that Plan participants and beneficiaries actually pay such costs through mutual funds' payment of fees to the record keeper – i.e. through hidden Revenue Sharing payments.

41. By failing to monitor the official governmental reports being filed on its behalf by the Committee, Edison knowingly allowed the Committee to conceal material information from participants regarding these fees, as discussed more below.

42. Simply stated, although assuring Plan participants that Edison pays for Plan administration, Defendants surreptitiously have caused Plan participants to pay such Plan administrative and record

keeping costs though hidden Revenue Sharing arrangements.

Defendants' Fiduciary Duties

43. Defendants are bound by ERISA's imposition of a fiduciary duty that has been characterized as "the highest known to law." Defendants' fiduciary obligations require that, at all times, they conduct themselves with the utmost good faith, loyalty and fidelity; act with the sole purpose of advancing the interests of the Plan, its participants and beneficiaries; scrupulously avoid all self-interest, duplicity and deceit; and fully disclose to, and inform participants and beneficiaries of, all material information.

44. Defendants' fiduciary obligations under ERISA require that they exercise the care, skill and diligence which a prudent expert would in the operation of a Plan with like character and aims.

45. Defendants' fiduciary obligations under ERISA require that they discharge their duties with the exclusive purpose of providing benefits to Plan participants and beneficiaries and defraying the reasonable cost of administering the Plan.

46. Defendants' fiduciary obligations under ERISA require them to ensure, at all times, that Plan assets are *never* used for the benefit of the employer; here, Edison.

47. Defendants' fiduciary obligations under ERISA require them to scrupulously avoid any transaction in which Plan assets would be used by, or inure to the benefit of, a party in interest in connection with the Plan.

48. Defendants have breached all of these fiduciary obligations.

DEFENDANTS' MULTIPLE BREACHES OF FIDUCIARY DUTY

Causing the Plan to Bear Unreasonable Expenses *And* Shifting Edison's Obligation to Pay Plan Costs to Participants

49. Defendants have breached their fiduciary obligations by causing the Plan, and thus its participants and beneficiaries, to pay excess and unreasonable fees and expenses to Plan service providers.

50. Defendants have caused the Plan to pay its service providers in a combination of two ways:

A. By direct disbursement from the Plan via "Hard Dollar" payments; and/or

B. Through hidden "Revenue Sharing" arrangements designed to collect "soft dollars" from Plan participants' accounts and use them to support the investment funds' revenue sharing programs.

51. "Hard Dollar" payments are direct disbursements from the Plan to a Plan service provider. The Plan's disclosed Hard Dollar payments are not the primary method by which the Plan's administrative and investment costs and expenses are paid.

52. Instead of paying the Plan's administrative costs with Hard Dollar payments, Defendants have caused the Plan to bear such costs through undisclosed Revenue Sharing arrangements, which amounted to approximately $1.8 million in 2007 alone, according to Edison's financial filings with the Securities and Exchange Commission.

53. In Revenue Sharing arrangements, Plan fiduciaries, like the Defendants here, select investment options ("Funds") which assess asset-based charges ("expense ratios") against Plan participants' retirement savings for the ostensible purposes of operating

the Fund and managing Fund investments. But in truth, such expense ratios are artificially inflated so as to collect *both* monies to be used for these ostensible purposes *and* "soft dollars" used to support the Fund's Revenue Sharing program.

54. Based upon the ostensible reasons for which Fund expense ratios are imposed, Plan participants investing in the Fund are led to expect and believe that the fees collected from their savings will benefit them by paying proper costs of operating the Fund and managing its investments.

55. This is false. The Funds transfer the soft dollars collected via Revenue Sharing arrangements to other individuals and entities, sometimes for Plan purposes and sometimes for unrelated purposes.

56. Here, the Plan's financial statements indicate that these soft dollars – collected from participants' retirement savings as part of undisclosed Revenue Sharing programs – have been, and are, transferred to other Plan administrative service providers *both*: (A) to pay the "cost of administering the Plan, including fees and expenses of the Trustee and the record keeper," which Edison is obligated to pay; *and* (B) to pay excess and unreasonable amounts to Plan service providers.

57. As a result of these undisclosed Revenue Sharing arrangements, Plan service providers – and potentially others – receive either or *both* Hard Dollar payments from the Plan *and* additional soft dollars that the Fund "shares" with them.

58. As a result, the total amount of fees and expenses that the Plan, and thus its participants and beneficiaries, were and are forced to bear are unreasonable and excessive.

59. By imprudently appointing individuals to the Committee unqualified to act in the Plan participants' best interest, and by imprudently monitoring the Committee's actions that caused the Plan to pay administrative costs and expenses through undisclosed Revenue Sharing transfers, Edison thereby enabled the Committee to serve Edison's financial interest at the expense of the Plan and its participants and beneficiaries. By selecting funds with Revenue Sharing programs, the Committee maximized the soft dollars collected by each Fund's Revenue Sharing program and, correspondingly, increased the soft dollars available to reduce Edison's liability to pay the Plan's administrative costs. By failing to monitor the Committee's actions, and by allowing the Committee to enter into these contracts with service providers on behalf of the companies, EDISON violated its fiduciary duties to the Plan, and committed a prohibited transaction, by benefiting its financial interests at the expense of the Plans and its participants and beneficiaries.

60. By causing the Plan, and its participants and beneficiaries, to pay administrative costs and expenses through undisclosed Revenue Sharing transfers, Defendants surreptitiously shifted Edison's obligation to pay Plan administrative expenses onto the Plan and its participants and beneficiaries.

61. By causing the Plan to pay administrative costs and expenses through undisclosed Revenue Sharing transfers, Defendants have concealed material information regarding: (1) the nature and purpose of the fees that are assessed against Plan participants' accounts; (2) to whom such fees are paid; (3) for what services they are paid; (4) whether the fees are reasonable for the services provided; (5) what services are being purchased and whether

they are necessary; and (6) whether such payments involve conflicts of interest or prohibited transactions.

62. By this conduct, Defendants have violated 29 U.S.C. § 1106(a)(1), in that they have caused the transfer of Plan assets to, or the use of Plan assets by, of for the benefit of, parties in interest.

63. In addition, by this conduct Defendants have undertaken flagrant self-dealing and self-interested transactions: They have used, and continue to use, Plan assets – taken from participants' accounts as part of hidden Revenue Sharing programs – to reduce or eliminate Edison's obligation to pay the administrative costs of the Plan, which they have represented that Edison is paying.

Failure to Capture Additional Compensation Streams For the Benefit of the Plan

64. Beyond collecting excessive fees from the Plan through Revenue Sharing programs, Plan service providers received additional, undisclosed compensation from their dealings with the Plan and Plan assets ("Additional Compensation Streams"). For example:

- consultants receive finders' fees from investment managers for the consultants' placement of Plan assets with a certain investment manager or mutual fund company;
- trustees or custodial banks perform cash sweeps of Plan accounts to capture cash before it is transferred to investment options and before it is transferred to participants receiving benefit payments from the Plan, and earn interest on those cash holdings (commonly referred to as "float");

- investment managers, custodial banks, prime brokers, and/or mutual funds receive payments for lending securities, owned by the Plan, to third parties; and
- in connection with foreign investments, investment managers and mutual funds reap additional compensation from profiting on foreign currency exchange.

65. In a multi-billion dollar plan, like the Plan here, such Additional Compensation Streams can result in millions of dollars of funds available to the Plan.

66. Plan fiduciaries must understand and consider these Additional Compensation Streams in fulfilling their fiduciary obligations to ensure that the proceeds of Plan assets are captured to defray Plan expenses and are applied solely for the benefit of the Plan and its participants and beneficiaries.

67. Here, Defendants have failed to fully capture the Additional Compensation Streams for the benefit of the Plan and its participants and beneficiaries.

68. By appointing among others, Frederick Grigsby, Aaron Whitley, Diane Featherstone, J. Michael Mendez, John Kelly, and Lillian Gorman to the Committee, who were neither qualified nor competent enough to ensure that Additional Compensation Streams were captured for the benefit of the Plan, and by failing to monitor the Committee's efforts to do the same, Defendants Edison failed to meet their fiduciary obligations to the Plan participants by allowing Additional Compensation Streams that would benefit the participants to go uncaptured.

The Inclusion Of More Than Three Dozen Retail Mutual Funds Among The Plan's Investment Options

69. The prudent and proper selection of investment options for the Plan is one of Defendants' core fiduciary obligations.

70. Here, Defendants included forty-seven investment options in the Plan in 2005, and more in prior years. These investment options include three pre-mixed portfolios, seven institutional funds (including the Edison International Stock Fund), and thirty-seven retail mutual funds in 2005 (in 2004, the Plan included thirty-eight retail mutual funds, and forty in 2003).

71. In 2005, the Plan held approximately $3.2 billion in assets. In 2004, it held approximately $2.7 billion, and in 2003, $2.1 billion.

72. In the financial and investments industry, a large institutional investor with billions of dollars, like the Plan, routinely can obtain lower prices for investment management and other services than can a retail investor with only thousands, or even a few million, dollars.

73. Defendants – as fiduciaries of a multi-billion dollar retirement savings plan – had enormous bargaining leverage in the investment marketplace. They squandered this leverage by subjecting the Plan and its participants to the high costs of retail/publicly-traded mutual funds and failing to provide investment options with significantly lower costs.

74. As fiduciaries, Defendants were obligated to use the Plans' bargaining power to require that investment managers consider and provide separate low cost investment accounts, collective investment

trusts, or common collective funds ("Separate Accounts") as Plan investment options.

75. Separate Accounts are investment vehicles in which investment managers pool the assets of a large investor, like the Plan, into a private trust and manage them according to a stated investment objective (*i.e.* large cap, value, growth, balanced growth, small cap, international equity, etc.).

76. However, Separate Accounts' operating expenses are substantially lower than those of mutual funds because they do not have to pay for advertising, marketing and distribution, nor do they have to maintain the liquidity required for trading in publicly-traded mutual funds.

77. Separate accounts also avoid subjecting Plan participants to conflicts of interest inherent in large mutual fund organizations. Mutual fund managers' own profit motive – driven by the assessment of fees against the fund's investments – conflict with investors' interest in reducing fees to maximize their returns.

78. Defendants breached their fiduciary duties by subjecting the Plan to pay the excess and unnecessary fees of retail mutual funds.

79. In addition, Defendants' inclusion in the Plan of approximately fifty investment options, including more than three dozen retail mutual funds, is an abdication of their core fiduciary obligation to prudently select investment options for inclusion in the Plan.

80. Rather than providing a menu of properly-vetted investment options that Plan participants are reasonably able to digest and analyze, Defendants have foisted upon Plan participants the burden of doing so themselves.

81. Simply stated, in a manner that is antithetical to the purposes of ERISA, Defendants, rather than doing so themselves, have imposed upon Plan participants the obligation to expertly analyze and narrow the Plan's investment options down to a reasonable menu of prudent choices. At the same time, Defendants have concealed information pivotal to performing such an analysis.

82. Not surprisingly, Defendants' conduct has resulted in scatter-shot investment of Plan assets, with hundreds of million of dollars being distributed among retail mutual funds imposing top-rate *retail* expense ratios for lackluster performance over time. Especially in light of the high level fees assessed against Plan participants' accounts, the performance and quality of the Plan's investment options is, and has been, quite poor, and the underperforming investment options have been imprudent.

83. While this scatter-shot investment of hundreds of millions of dollars into retail mutual funds is detrimental to the Plan and its participants and beneficiaries, it has greatly benefited Edison. By failing to appoint competent and qualified individuals to the Committee, and failing to ensure those individuals selected prudent investment options by employing a prudent process to monitor their work, Defendants Edison placed its own corporate financial interest ahead of the financial interests of the participants, and committed prohibited transactions under ERISA § 406.

84. The top-rate expense ratios of these retail mutual funds enable the collection of more soft dollars via their Revenue Sharing programs, which ensures that the Funds will have more soft dollars to transfer to the Plan's administrative service providers. In turn, the Funds' larger payments to the Plan's

administrative service providers reduce by larger amounts, or entirely eliminate, Edison's obligation to pay the administrative costs of the Plan.

Subjecting The Plan to Active Investment Management Expenses

85. The vast majority of the Plan's investment options are, and have been, actively managed retail mutual funds. In actively-managed mutual funds, the investment manager seeks to outperform the Fund's benchmark. This is more expensive than passive management, in which Fund managers conform their holdings to those of a particular benchmark, such as an index, which does not require paying for the selection of stocks, yet provides a market return.

86. The inclusion of such actively-managed funds in a plan of this size is detrimental to the interests of the Plan and its participants and beneficiaries. It repeatedly has been established that actively-managed funds rarely outperform such indexes on a risk-adjusted basis when held as long-term investments, and that the average actively-managed retail mutual fund underperforms the market after expenses. The Plan's Funds here, after fees for active management, consistently underperformed the market.

87. Defendants Edison failed to employ a proper process to appoint individuals with the knowledge of the overwhelming established literature stating that actively-managed retail mutual funds rarely outperform such indexes on a risk-adjusted basis when held as long-term investments, and that the average actively-managed retail mutual fund underperforms the market after expenses. In doing so, and in failing to establish a prudent process to monitor

the Committee to ensure that imprudent funds were not selected for the Plan, Edison violated its fiduciary duties to the Plan participants.

88. Defendants' inclusion in the Plan of these actively-managed mutual funds provided, and provides, no added value to participants while forcing them to bear substantial and unnecessary fees. Over time and on a risk-adjusted basis, the Plan's actively-managed Funds have under-performed, and are known to under-perform, market returns by at least the level of such fees.

89. By failing to appoint competent and qualified individuals to the Committee, and failing to ensure those individuals selected prudent investment options by employing a prudent process to monitor their work, Defendants Edison placed its own corporate financial interest ahead of the financial interests of the participants, and committed a prohibited transaction in violation of ERISA § 406.

90. Including dozens of actively-managed retail funds as investment options in the Plan virtually guaranteed that participants and beneficiaries would receive less than a market return on their long-term retirement savings, when they could have received market returns. In doing so, Defendants breached their core fiduciary duties to the Plan.

Fees and Cash Holdings in the Edison Stock Fund

91. Through the Plan's Edison International Common Stock Fund (the "Edison Stock Fund"), participants can invest their 401(k) retirement savings in Edison International Common Stock ("Edison Stock").

92. The Edison Stock Fund does not need to pay for investment management. It holds an undiversi-

fied portfolio of Edison stock. The Edison Stock Fund's fees should be minimal. They are not.

93. The Edison Stock Fund, as a retirement savings vehicle, is intended for long-term investing. There is no need for it to hold substantial amounts of cash.

94. The Edison Stock Fund's cash holdings reduce the Fund's return because the value of the cash remains static.

95. Defendants breached their fiduciary duties by: (A) charging, and or allowing to be charged, excess and unreasonable fees and expenses to participants' retirement savings in the Edison Stock Fund; (B) maintaining and holding, causing to be maintained or held, or allowing to be maintained or held, excess cash in the Edison Stock Funds and thereby impairing participants' returns; and (C) obscuring, and/or misleading participants about, these facts.

Defendants' Campaign of Nondisclosure, Concealment and Misrepresentation

96. As set forth above, Defendants have misled Participants by representing that Edison pays the administrative costs of the Plan, when, in truth, Defendants have ensured that some – if not all – of such administrative costs are borne by the Plan, and its participants and beneficiaries, through hidden Revenue Sharing arrangements.

97. As set forth above, Defendants have manipulated, disguised and misrepresented the nature of the fees and expenses incurred by the Plan, and by their inclusion of the Funds as Plan investment options, placed their imprimatur on them as prudent vehicles for long-term retirement savings.

98. As set forth above, Defendants have not disclosed, and/or have affirmatively concealed, a litany of material information including:

A. That Defendants have undertaken, and continue, a long campaign of prohibited and self-interested transactions designed to shift to the Plan, and its participants and beneficiaries, Edison's obligation to pay "the cost of administering the Plan, including fees and expenses of the Trustee and record keeper;"

B. That the Plan's size and asset value enabled Defendants to provide lower-priced investment options;

C. That the excess and unreasonable fees assessed against the Plan, including fees paid for retail mutual funds and active investment management, were and are depriving participants of the opportunity to receive market returns;

D. That the unreasonable and excessive fees and expenses assessed against their accounts would undermine substantially the value of participants' retirement savings over time;

E. That Plan service providers were and/or are collecting excess fees from participants' accounts to provide soft dollars to support Revenue Sharing programs;

F That Plan service providers were and/or are receiving excess payments via Additional Compensation Streams;

G. That monies collected via Revenue Sharing programs was, and is, available for the benefit of the Plan and its participants;

H. That Additional Compensation Streams provided additional revenues to Plan service providers and was not captured for the benefit of the Plan;

I. The amount of soft dollars, taken from participants' retirement savings and transferred among Plan service providers (and others) as part of undisclosed Revenue Sharing programs;

J. The amount that Plan service providers received via Additional Compensation Streams;

K. That the expense ratios charged in Plan investment options were and are inflated for the purpose of collecting soft dollars *not* used for the investment management and operation of the investment option/Fund, (*i.e.* the ostensible purpose for the imposition of such fees) *but rather* used to support undisclosed Revenue Sharing programs and to reduce or eliminate Edison's obligation to pay the administrative costs of the Plan;

L. That the expense ratios of Plan investment options/Funds are inflated for the purpose of collecting soft dollars to be used for Revenue Sharing programs so that the *stated expense ratio is not the true and accurate cost of investing* in the investment option/Fund;

M. Who is receiving Plan assets, derived from participants' accounts, through Revenue Sharing and/or Additional Compensation Streams;

N. How much each service provider is paid with Plan assets, derived from participants' accounts, when Hard Dollar fees *and* Revenue Sharing *and* Additional Compensation Streams are considered;

O. Whether the total amount paid to services providers (*i.e.* disclosed, Hard Dollar fees *combined with* Revenue Sharing payments *and* Additional Compensation Streams) is reasonable in light of the services provided and incurred solely for participants' benefit;

P Whether Plan fiduciaries have forgone Revenue Sharing and/or Additional Compensation Streams available in connection with Plan investment options, and thereby unnecessarily increased the expenses which Plan participants otherwise must bear;

Q. The true and accurate amount of record-keeping and administrative fees that is assessed against participants' accounts in the Plan; in that Plan record keepers and administrators receive *both* the fees disclosed as Hard Dollar payments to them and *undisclosed* soft-dollar payments as part of Funds' Revenue Sharing programs;

R. The true and accurate price of Plan investment options/Funds, in that the stated expense ratios of Plan investment options/ Funds are overstated so as to provide soft dollars to be used in Revenue Sharing programs;

S. The true and accurate amount of fees paid to investment managers *for actual investment management services* (*i.e.* the actual amount of investment management being

purchased) in any Plan investment option/ Fund; in that the investment management prices represented in the expense ratios of Plan investment options/Funds are overstated so as to include extra monies to provide soft dollars for Revenue Sharing programs;

T. In actively-managed investment options/ Funds, the actual amount of active management services that Plan participants are purchasing, in that the inclusion of undisclosed Revenue Sharing amounts in the expense ratios of actively-managed investment options/Funds renders participants incapable of knowing whether the higher fees charged by actively-managed Funds actually are used for active investment management rather than as a vehicle to collect soft dollars to support the Funds' Revenue Sharing programs;

U. Whether hidden payments of Plan assets, through undisclosed Revenue Sharing programs, are masking additional prohibited transactions and/or conflicts of interests between or among Plan fiduciaries and service providers;

V. That, especially in light of the high level fees assessed against Plan participants' accounts, but also because of imprudent selection of investment options and Edison's failure to monitor the Committee, the performance and quality of the Plan's investment options is, and has been, quite poor.

W. Whether services are being purchased that are unnecessary for the Plan;

X. That participants' returns in the Edison Stock Fund consistently and substantially lag behind those of Edison Stock;

Y. That Defendants' conduct of causing or allowing the Edison Stock Fund to maintain excess and unnecessary amounts of cash, and to charge excess fees and expenses, has impaired the Plan's and Plan participants' returns in the Fund; and

Z. The actual amount of fees and expenses associated with the Plan and Plan participants' investment in the Edison Stock Fund.

99. Because the Defendants failed and refused to provide them with this information, and concealed this information from them, and because Edison failed to monitor the communications being made to participants and deliberately allowed this information to be concealed and hidden, Plan participants have lacked the information necessary for them: (a) to understand and protect their interests in the Plan; (b) to have knowledge regarding the Defendants' breaches of fiduciary duty; and (3) to have reason to believe they should make inquiry about those breaches and the facts underlying them.

100. Defendants know that Plan participants lack such information and knowledge.

101. In their fiduciary roles, Defendants are the parties with the information necessary to know and understand whether the participants' rights and protections under ERISA are being, or have been, violated. ERISA fiduciaries, such as Defendants here, have an affirmative obligation to provide full and accurate information to the Plan participants regarding the administration of the Plan.

102. As a result of all of the foregoing, including Defendants' campaign of non-disclosure, concealment and misrepresentation, Plaintiffs and all Plan participants and beneficiaries have been forced to pay excessive fees and expenses from their 401(k) accounts and have suffered financial losses and damages.

COUNT I

[Breach of Fiduciary Duty – ERISA § 502(a)(2)]

103. Plaintiffs restate and incorporate the allegations contained in ¶¶ 1 through 102 as though fully set forth here.

104. As set forth in detail above, Defendants owe to the Plan, its participants and beneficiaries, and the Class extensive fiduciary duties including, without limitation:

A. To conduct themselves with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent ERISA professional fiduciary would in operating and administering a 401(k) plan the size and character of the Plan;

B. To perform their duties as Plan Sponsor, Administrator, and/or fiduciaries with the utmost loyalty and fidelity to the Plan and its participants and beneficiaries, avoiding at all times conflicts of interest, self-interest, and duplicity;

C. To ensure, at all times, that Plan assets "shall never inure to the benefit of any employer and shall be held for the exclusive purposes of providing benefits to participants in the Plan and their beneficiaries and defraying reasonable expenses of administering the Plan;"

D. To properly and prudently select investment alternatives for the Plan;

E. To ensure, at all times, that the Plan avoid self-interested and/or prohibited transactions;

F. To know and understand the fees and expenses charged to the Plan, and whether they were or are unreasonable or excessive;

G. To track and account for all transactions involving the Plan and Plan assets so as to ensure that Plan assets are retained, managed, and disbursed in compliance with the Plan Document and ERISA;

H. To ensure that all Revenue Sharing monies and Additional Compensation Streams are accounted for and captured for the benefit of the Plan;

I. To track and account for all transactions involving the Plan and Plan assets so as to ensure that Plan assets "never inure to the benefit of any employer and shall be held for the exclusive purposes of providing benefits to participants in the Plan and their beneficiaries and defraying reasonable expenses of administering the Plan;"

J. To ensure that the fees and expenses incurred by the Plan are reasonable and incurred for the sole and exclusive benefit of Plan participants and beneficiaries;

K. In entering into agreements with service providers to the Plan, to ensure that the payments from the Plan – whether they are direct or indirect – are reasonable for the services provided and made for the sole and exclusive benefit of Plan participants and beneficiaries;

L. To ensure that the funds selected for the Plan do not underperform their appropriate relative benchmarks, resulting in losses to the Plan participants' retirement savings;

M. To appoint qualified and competent individuals to operate and administer the Plan in a manner solely for the benefit of Plan participants and beneficiaries;

N. To monitor and oversee the individuals tasked with operating and administering the Plan, to ensure that they are doing so in a manner solely for the benefit of Plan participants and beneficiaries;

O. In operating and administering the Plan, to establish, implement, and follow procedures to properly and prudently determine whether the fees and expenses paid by the Plan were reasonable and incurred solely for the benefit of Plan participants and beneficiaries;

P. In operating and administering the Plan, on an ongoing basis to monitor that the payments made by the Plan to service providers – whether they are direct or indirect – are and remain reasonable for the services provided and made for the sole and exclusive benefit of Plan participants and beneficiaries;

Q. To inform itself of, and understand, the various methods by which vendors in the 401(k) industry collect payments and other revenues from 401(k) plans;

R. To inform itself of trends, developments, practices, and policies in the retirement, financial investment and securities indus-

try which affect the Plan; and to remain aware and knowledgeable of such trends, practices and policies on an ongoing basis;

S. To communicate with Plan participants and beneficiaries regarding the Plan honestly, clearly and accurately;

T. To affirmatively and without request provide Plan participants and beneficiaries with honest, accurate and complete information they need to understand their investments in the Plan; the management, risk, potential returns of such investments; and the fees and expenses incurred in connection with those investments;

U. To provide honest, accurate and complete information to Plan participants and beneficiaries regarding the costs associated with their various investment choices and directions; and

V. To ensure that the Edison Stock Funds' cash holdings and fees are appropriate for long-term retirement savings and do not impair participants' returns.

105. As set forth in detail above, Defendants breached their fiduciary obligations to the Plan, Plan participants and beneficiaries, and the Class by, among other conduct to be proven at trial:

A. Failing to employ a prudent process in their appointment of plan fiduciaries, including, among others, Frederick Grigsby, Aaron Whitley, Diane Featherstone, J. Michael Mendez, John Kelly, and Lillian Gorman to the Committee, to ensure these individuals had the necessary skills and qualification to oversee and run the Plan

for the best interests of the Plan participants;

B. Failing to properly monitor, through a prudent process, the performance of plan fiduciaries, including, among others, Frederick Grigsby, Aaron Whitley, Diane Featherstone, J. Michael Mendez, John Kelly, and Lillian Gorman to the Committee, to ensure these individuals overseeing and running the Plan for the best interests of the Plan participants, and thereby knowing allowing the below breaches of fiduciary to occur;

C. Failing to properly and prudently select plan investment options, including but not limited to the imprudent selection of sector funds, such as the T. Rowe Price Science & Technology Fund, making selections for self-interested reasons, and/or abdicating their responsibilities in this regard;

D. Shifting to the Plan, and its participants and beneficiaries, Edison's obligation to pay the cost of administering the Plan, including fees and expenses of the trustee and record keeper, in violation of the Plan documents and other documents regarding the Plan including, but not limited to, the Plan's financial statements filed with the Department of Labor and the Plan's Form 11-k filed with the Securities and Exchange Commission;

E. Squandering the Plan's enormous bargaining leverage in the large retirement plan marketplace by including as Plan investment options dozens of retail mutual funds which charged excessive fees, including a

component for administration that was not being provided to the Plan by the mutual funds, and was unnecessary because administrative services were already being provided to the Plan.

F. Denying Plan participants and beneficiaries the opportunity to receive market returns over the long term and on a risk-adjusted basis by including, as Plan investment options, retail mutual funds;

G. Causing the Plan, and its participants and beneficiaries, to pay the high costs of active investment management that provided no benefit to their long-term retirement savings and provided less than market returns after fees;

H. Causing assets to be removed from the Plan, and the retirement savings of participants and beneficiaries, for the purpose of providing soft dollars to be used in undisclosed Revenue Sharing programs;

I. Causing the Plan to pay fees and expenses that were, or are, unreasonable and/or not incurred solely for the benefit of Plan participants and beneficiaries;

J. Failing to monitor the fees and expenses paid by the Plan and, by such failure, causing and/or allowing the Plan to pay fees and expenses that were, or are, unreasonable and/or not incurred solely for the benefit of Plan participants and beneficiaries;

K. By engaging in, and causing the Plan to engage in, prohibited transactions in violation of ERISA § 406;

L. By failing to know and understand the fees and expenses charged to the Plan, and whether they were or are unreasonable or excessive;

M. Failing to account for Revenue sharing monies and Additional Compensation Streams, including, but not limited to, float;

N. Failing to inform itself of trends, developments, practices, and policies in the retirement, financial investment and securities industry which affect the Plan; and failing to remain aware and knowledgeable of such trends, practices and policies on an ongoing basis, including, but not limited to, the failure to inform itself of the common practice of including a higher return Stable Value Fund, which provides liquidity and preservation of principal, as the Plan's most conservative investment option, in lieu of a money market fund;

O. Failing to inform itself of, and understand, the various methods by which vendors in the 401(k) industry collect payments and other revenues from 401(k) plans;

P. Failing to establish, implement, and follow procedures to properly and prudently determine whether the fees and expenses paid by the Plan were reasonable and incurred solely for the benefit of Plan participants and beneficiaries;

Q. Failing to communicate with Plan participants and beneficiaries regarding the Plan honestly, clearly and accurately;

R. Failing to use the Plan's bargaining power to obtain separate accounts, commingled trusts, or commingled pools/funds in place of retail mutual funds, which would have subjected Plan participants to significantly lower expenses;

S. Allowing numerous retail mutual funds to be included as Plan investment options, and thereby breaching their fiduciary duty to select reasonable and prudent investment choices for the Plan and diluting the Plan's bargaining power, based upon its asset size, to secure lower cost investment options;

T. Failing to select prudent investment options in the best interest of the Plan participants and beneficiaries, including but not limited to, the imprudent selection of an underperforming money market fund which charged excessive investment management fees, as well as failing to offer a Stable Value Fund as an investment option in lieu of a money market fund;

U. Which investment options (a) underperformed and (b) were included for reasons other than those which a prudent fiduciary would consider in selecting investment option.

V. Allowing Plan service providers, at the Plan's expense, to receive Additional Compensation Streams, including, but not limited to float, and failing to capture such Additional Compensation Streams for the benefit of the Plan;

W. Allowing Plan service providers, the Plan's expense, to receive soft dollars removed from participants' accounts as part of undisclosed Revenue Sharing programs, and failing to capture such soft dollars for the benefit of the Plan;

X. Failing to properly inform and/or disclose to Plan participants the total amount and nature of the fees and expenses that are, or have been, charged by each fund in the Plan and paid by the Plan;

Y. Failing to discover, disclose and stop the charging of hidden and excessive fees to the Plan;

Z. Improperly managing the Edison Stock Fund, and by causing and/or allowing the Edison Stock Fund to hold excessive and unnecessary cash and assess unnecessary and excessive fees so as to impair participants' returns; and

AA. By the foregoing conduct, failing to exercise the loyalty, care, skill, prudence and diligence that a prudent person would when acting in like capacity and familiar with such matters.

106. As set forth in detail above, as a result of these breaches, the Plan, Plaintiffs, the Class, and the Plan's participants and beneficiaries have suffered financial losses and damages, and Defendants have been enriched by such practices.

107. Pursuant to ERISA §§ 409 and 502(a), Defendants are personally liable to make good to the Plan for the losses it experienced as a result of Defendants' breaches of fiduciary duty.

108. Pursuant to ERISA §§ 409 and 502(a), Defendants are personally liable for any other available and appropriate equitable relief, including prospective injunctive relief and declaratory relief, and attorney's fees.

COUNT II:

[Other Remedies for Breach of Fiduciary Duty – ERISA § 502(a)(3)]

109. Plaintiffs restate and incorporate the allegations contained in ¶¶ 1 through 108 as though fully set forth here.

110. In addition to, and as an alternative to, the causes of action stated in Count I, Plaintiffs seek further relief pursuant to ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3).

111. Under ERISA § 502(a)(3), a participant may enjoin any act which violates ERISA or may obtain other appropriate equitable relief to redress such violations or enforce the terms of ERISA.

112. Defendants are the primary fiduciaries of the Plan and occupy a position of trust and confidence in connection with the Plan, the Plan's assets, and the Plan's participants and beneficiaries.

113. Defendants have exclusive discretion and control over the Plan's assets and are strictly obligated to exercise that control "for the exclusive purposes of providing benefits to participants in the Plan and their beneficiaries and defraying reasonable expenses of administering the Plan."

114. By accepting possession and control over Plan participants' assets, Defendants necessarily have also accepted the obligation to explain and account for every transaction, expenditure, application and distribution of such assets.

115. Although *only* Plan participants and beneficiaries are entitled to Plan assets and to the benefit of Plan assets, in the absence of full and candid disclosure from Defendants, Plan participants and beneficiaries do not know, and have no means of knowing, how their assets have been managed, used and disbursed.

116. Accordingly, Defendants occupy the position of a common law trustee in connection with the Plan, its assets, and its participants and beneficiaries.

117. As set forth in detail above, Defendants have caused the Plan to pay – directly and via hidden Revenue Sharing transfers and hidden Additional Compensation Streams – excess fees and expenses to Plan service providers.

118. As set forth in detail above, Defendants have used Plan assets for their benefit, and at the expense of the Plan. They have caused the soft dollars collected from participants' accounts via undisclosed Revenue Sharing programs to be used to reduce or eliminate Edison's obligation to pay the cost of administering the Plan, including fees and expenses of the trustee and record keeper.

119. Litigating and resolving these issues will involve identifying and reconciling multiple transfers, payments, and flows of Plan assets that occurred while such Plan assets were within Defendants' possession and control.

120. Defendants, and not the Plaintiffs, are the entities which have and/or should have specific and detailed information regarding how Plan assets have been treated and disbursed in this regard.

121. An accounting is a particularly appropriate equitable remedy in circumstances where, as here, the underlying action and accounts are so complicat-

ed that a normal action for a fixed sum may not be practical.

122. In such an accounting, in light of their possession and control of Plan assets and information about how Plan assets have been applied and distributed, Defendants must bear the burden of proving all Plan transactions and their propriety.

123. Accordingly, Plaintiffs respectfully request that the Court order the Defendants to render an accounting of all transactions, disbursements and dispositions occurring in, in connection with, and/or in respect of, the Plan and its assets.

124. Plaintiffs respectfully request that the Court order that such an accounting include, without limitation, detailed and specific information regarding all fees and expenses incurred by the Plan and/or paid to third parties, whether paid directly by the Plan or indirectly transferred among Plan service providers or other third parties; all soft dollars collected through Revenue Sharing programs; and all Additional compensation Streams.

125. Plaintiffs respectfully request that the Court charge/surcharge against the Defendants and in favor of the Plan all amounts involved in transactions which such accounting reveals were or are improper, excessive and/or in violation of ERISA.

126. Plaintiffs respectfully request that the Court order Defendants to disgorge all amounts credited to Edison for all recordkeeping and administrative costs which Edison was obligated to pay and which Defendants assured Plan participants it would and/or did pay.

127. Plaintiffs further seek injunctive and other appropriate equitable relief to redress the wrongs described above and to cause them to cease so that

the Plan's participants and beneficiaries receive the full benefit of their retirement savings in the future.

WHEREFORE Plaintiffs, on behalf of the Plan and all similarly situated Plan participants and beneficiaries, respectfully request that the Court:

- find and declare that the Defendants have breached their fiduciary duties as described above;

  find and adjudge that Defendants are personally liable to make good to the Plan all losses that the Plan incurred as a result of the conduct described above and to restore the Plan to the position it would have been in but for the breaches of fiduciary duty;
- award actual damages to the Plan in the amount of its monetary losses;
- impose a constructive trust on any monies by which the Defendants were unjustly enriched as a result of their breaches of fiduciary duty and cause the Defendants to disgorge such monies and return them to the Plan;
- remove the fiduciaries who have breached their fiduciary duties and/or enjoin them from future breaches of ERISA;
- require Defendants to render an accounting as set forth above;

  surcharge against Defendants and in favor of the Plan all amounts involved in transactions which such accounting reveals were or are improper, excessive and/or in violation of ERISA;
- permanently enjoin Defendants from breaching their fiduciary duties in each respect set forth in the Complaint;

  award to the Plaintiffs and the Class their attorneys fees and costs pursuant to ERISA § 502(g);

- order costs and attorneys fees pursuant to ERISA § 502(g) and the common fund doctrine;
- order equitable restitution or other available equitable relief against the Defendants;
- order the payment of interest to the extent it is allowed by law; and
- grant any other and further relief the Court deems appropriate.

PLAINTIFFS DEMAND A JURY TRIAL ON ALL COUNTS AND ISSUES SO TRIABLE.

Respectfully Submitted,
SCHLICHTER, BOGARD & DENTON
By: /s/ JEROME J. SCHLICHTER

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[Attorney Names & Addresses Omitted]

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Case No. CV 07-5359 SVW (AGRx)

GLENN TIBBLE, ET AL.,
Plaintiffs,

v.

EDISON INTERNATIONAL, ET AL.,
Defendants.

DECLARATION OF BARBARA DECKER IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT EXHIBITS A-OO FILED UNDER SEAL

[Filed May 18, 2009]

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* * *

Exhibit M

RESOLUTION OF THE BOARD OF DIRECTORS OF EDISON INTERNATIONAL

Adopted: December 14, 2000

RE: TRUST INVESTMENT COMMITTEE

WHEREAS, Southern California Edison Company ("SCE") has maintained a Trust Investment Committee ("SCE Committee") and delegated to it the authority and fiduciary responsibility to direct and control the financial management of the assets of SCE's employee benefit trusts;

WHEREAS, because SCE benefit plans and programs now extend to employees of this corporation and its other affiliates, and the benefit plans and programs of this corporation extend to SCE employees, it has been proposed that this corporation establish a single committee to direct and control the financial management of the assets of all employee benefit trusts within the affiliated group of companies including this corporation, and that such committee assume all duties of the SCE Committee upon its termination concurrent with establishment of the new committee; and

WHEREAS, this Board of Directors considers it advisable and in the best interests of this corporation to establish a new committee and to delegate the authority, duties and responsibilities for management of the assets of this corporation's employee benefit trusts to that committee, and for that committee to assume the fiduciary duties and responsibilities for management of the assets of employee

benefit trusts of other companies of the affiliated group of companies including this corporation;

NOW, THEREFORE, BE IT RESOLVED, that a committee of this corporation to be known as the Edison International Trust Investment Committee ("EIX Committee") is hereby established effective January 1, 2001 and delegated the fiduciary duties and responsibilities for management of the assets of all employee benefit trusts within the affiliated group of companies including this corporation.

BE IT FURTHER RESOLVED, that the EIX Committee shall be responsible for establishing investment policy and guidelines, hiring and terminating trustees and reporting annually to the Board of Directors of this corporation and of SCE or an appropriate respective Committee of the Boards of Directors the financial status and performance of the trusts for which it has responsibility; and, that the EIX Committee may take such other actions with respect to the management and oversight of the trust assets that it deems necessary or appropriate in its discretion.

BE IT FURTHER RESOLVED, that the EIX Committee shall assume the fiduciary duties and responsibilities of the SCE Committee for management of the assets of SCE's employee benefit trusts if so delegated by the SCE Board of Directors.

BE IT FURTHER RESOLVED, that notwithstanding anything to the contrary contained herein, the EIX Committee may delegate to a subcommittee the responsibility to make decisions necessary to implement investment policy including the appointment and evaluation of professional investment managers on behalf of the employee benefit plan trusts over which the EIX Committee has responsibility, the

subcommittee may be of any size provided it includes at least two members of the EIX Committee, and a majority vote, including the affirmative vote of at least one member of the subcommittee who is also a member of the EIX Committee, shall be required for the subcommittee to take action on behalf of the EIX Committee.

BE IT FURTHER RESOLVED, that the EIX Committee and subcommittee shall initially be comprised of those same individuals comprising the SCE Committee and subcommittee immediately prior to termination of the SCE Committee, and that members and Chair of the EIX Committee henceforth shall be appointed and removed at the discretion of the Chief Executive Officer of this corporation, who shall also determine the size of the EIX Committee, and that members and Chair of the EIX subcommittee henceforth shall be appointed and removed by the Chair of the EIX Committee.

BE IT FURTHER RESOLVED, that except as otherwise provided herein and until the EIX Committee determines otherwise, the structure, policies and procedures of the former SCE Committee and subcommittee will continue intact, and the governance provisions of the Retirement Plan Investment Policy Objectives and Guidelines adopted by the SCE Committee on January 12, 1995 shall define the respective responsibilities of the committees and staff with respect to all employee benefit plan trusts over which the EIX Committee has responsibility.

BE IT FURTHER RESOLVED, that any officer of this corporation is authorized to execute any document, agreement, plan amendment or to take any other action deemed by such officer to be necessary or useful to implement the intent of this resolution.

APPROVED:

/s/ [Illegible]

Chairman of the Board

/s/ [Illegible]

Executive Vice President
and General Counsel

RESOLUTION OF THE BOARD OF DIRECTORS OF SOUTHERN CALIFORNIA EDISON COMPANY

Adopted: December 14, 2000

RE: Trust Investment Committee

WHEREAS, by resolution dated February 18, 1993, this Board of Directors delegated the authority and fiduciary responsibility to direct and control the financial management of the assets of this corporation's employee benefit trusts to the Trust Investment Committee;

WHEREAS, because the benefit plans and programs of this corporation now extend to employees of other Edison International ("EIX") companies and Edison International benefit plans and programs extend to employees of this corporation, the EIX Board of Directors is establishing a single Trust Investment Committee to direct and control the financial management of the assets of all employee benefit trusts within the EIX affiliated group of companies including this corporation; and

WHEREAS, this Board of Directors considers it advisable and in the best interests of this corporation to terminate the Trust Investment Committee of this corporation and to delegate to the EIX Trust Investment Committee the duties and responsibilities for management of the assets of this corporation's employee benefits trusts;

NOW, THEREFORE, BE IT RESOLVED, that the Trust Investment Committee of this corporation is terminated on the close of business on December 31, 2000 and that the EIX Trust Investment Committee is hereby delegated effective January 1, 2001 responsibility for the management of the assets of this

corporation's employee benefit trusts along with the attendant fiduciary duties and responsibilities.

BE IT FURTHER RESOLVED, that the EIX Trust Investment Committee may appoint trustees and professional investment managers on behalf of this corporation's employee benefit plan trusts and take such other actions with respect to the management and oversight of the trust assets that it deems necessary or appropriate in its discretion.

BE IT FURTHER RESOLVED, that the EIX Investment Trust Committee shall provide a report to this Board of Directors or an appropriate Committee of this Board of Directors annually on financial matters related to the benefit plans of this corporation.

BE IT FURTHER RESOLVED, that any officer of this corporation is authorized to execute any document, agreement, plan amendment or to take any other action deemed by such officer to be necessary or useful to implement the intent of this resolution.

APPROVED:

/s/ [Illegible]

_____

Chairman of the Board

/s/ [Illegible]

_____

Vice President and
General Counsel

Exhibit FF

Trust Investment Committee / Chairman's Subcommittee

[Image Omitted]

[Table of Contents Omitted]

SOUTHERN CALIFORNIA EDISON COMPANY RETIREMENT PLAN INVESTMENT POLICY OBJECTIVES AND GUIDELINES

I. FUND OBJECTIVE

The primary objective of the pension fund is to generate sufficient assets to meet the Company's pension obligations to its past and present employees. In accomplishing this, the following must be considered:

A. PLAN RETURNS

The fund's assets will be invested to maximize returns in a manner consistent with the benefit payment obligations and risk tolerance of the plan.

B. FUNDING

Company contributions will be based on the actuarially determined liabilities of the fund. Consideration will also be given to minimizing changes in funding amounts from year to year to ensure equitable allocations of pension funding costs among customers over time.

C. ERISA

The fund will be invested and administered in a manner that is consistent with the requirements of the Employee Retirement Income Security Act of 1974 ("ERISA"), including, among others, the prudent investor rule and the obligation to plan for cash flow adequate to meet benefit payment obligations.

II. ASSET ALLOCATION

Assets are allocated with the objective of maximizing the long-term total return of the fund consistent with the level of risk assumed. Risk is defined as the potential for fluctuation in the difference between the plan's assets and liabilities. To reduce this risk, the fund invests in diverse asset classes within the ranges specified below. Temporary differences away from the policy portfolio may result from deliberate asset allocation shifts by the tactical asset allocation managers, market movements, and the tactical use of risk control strategies.

POLICY ASSET ALLOCATION ***(updated July 1999)***

Asset Class	Policy Portfolio (%)	Policy Range (%)
US Stocks	45	40-50
International Stocks	25	20-30
Alternative Investments	4	
Total Equity	74	69-79

Long-Term Bonds	0	
Intermediate-Term Bonds	26	
Cash/Short-Term	0	
Total Fixed Income	26	21-31
Alternative Assets	4	0-10
Total Fund	100	

Tactical moves outside the above ranges can be made with approval of the Trust Investment Committee ("TIC").

A single active manager shall not manage more than 25% of the total fund assets.

USE OF DERIVATIVES

Use of derivatives shall not cause asset class policy ranges to be exceeded, or cause the total fund to be leveraged. With specific approval from the TIC or the Chairman's Subcommittee of the TIC, managers may use derivatives to implement strategies consistent with the fund's overall investment objectives and policy. Limited use of derivatives include cost-effective implementation of asset allocation changes, fixed income duration adjustment, hedging of risk (including currency hedging), return enhancement, and cash equitization. Leveraged transactions are not permitted.

III. INVESTMENT PERFORMANCE OBJECTIVES

The fund's long-term performance will be measured against that of the policy portfolio using the appropriate weighted benchmark for each class. The goal is to add value over the policy portfolio, net of fees, without substantially increasing risk.

Asset Class	Policy Weight (%)	Benchmark
US Equities	45	Russell 3000 Index
Non-US Equities	25	MSCI EAFE Index, 50% hedged/ 50% unhedged
Fixed Income	26	Lehman Brothers Aggregate
Alternative Assets	4	Russell 2000 Index
	100	

IV. PROXY VOTING

Each investment manager will be provided with the fund's proxy voting policy. The investment managers are solely responsible for the voting of all proxies related to stocks which are held on behalf of the fund. Investment managers are to review each proxy proposal carefully and thoughtfully on its individual merits, and vote solely in the best economic interest of the plan's participants and beneficiaries, as required by ERISA.

The investment managers may be asked to describe their decision criteria for proxy voting in general or for particular stocks and proposals.

Each investment manager will have proxy voting guidelines and be able to explain why exceptions to their voting guidelines are made; document each vote and the basis for each vote; and provide the fund with copy of its proxy voting guidelines annually or whenever they are revised.

V. MANAGERS

Allocation of funds to outside managers will reflect the goal of diversification. Within an asset class, allocations to managers will be determined by the characteristics of both the asset class and the investment manager. The latter includes management stability, investment style and strategy, performance record, and portfolio size and composition.

A. SELECTION

Investment manager selection will be assisted by the recommendations of the Investments Staff ("Staff"). The two most important criteria for selection will be the manager's investment process and its performance. The manager's process must be coherent, theoretically sound, and followed consistently. The manager should also demonstrate its ability to outperform an appropriate benchmark and similar managers consistently over the past five years and/or the latest complete market cycle. Within an asset class, if no active manager's performance net of fees has consistently surpassed the appropriate benchmark, the use of passive investment vehicles will be considered.

B. REVIEW

Each investment manager will be given a written set of investment guidelines to follow. Each manager's performance will be reviewed quarterly in relation to the appropriate benchmarks. Consideration will be also be given to the risk assumed by each manager and the degree to which each manager has followed its stated investment process. Staff will meet with managers at least annually.

C. TERMINATION

Termination of an investment manager will be considered when that manager's performance over a reasonable period of time is below that of the benchmark's, when the manager fails to maintain a consistent investment strategy, when a significant change in the manager's personnel raises questions about that firm's continued investment capabilities, or for any other reason considered appropriate.

VI. GOVERNANCE

A. TRUST INVESTMENT COMMITTEE

The Board of Directors (the "Board") has delegated authority and fiduciary responsibility for the trusts and assets of the Retirement Plan and Post-Retirement Benefits Other Than Pensions to the Trust Investment Committee ("TIC"), which is the Named Fiduciary for purposes of these responsibilities under ERISA. The TIC may delegate elements of authority and fiduciary responsibility to its Chair, Chairman's Subcommittee, Staff, outside consultants, or investment managers

as it deems proper. The TIC is appointed by the Chairman of the Company.

The TIC is responsible for:

1. Setting asset class targets and ranges;
2. Approving any changes to targets or ranges, including addition of new asset classes;
3. Approving tactical asset allocation outside ranges;
4. Hiring and terminating trustees; and
5. Reporting to the Board at least once each year regarding the financial status and performance of the trusts and assets for which it has fiduciary responsibility.

The TIC should meet once per year, and additionally as needed. Approval of recommendations, issues and administrative matters requires a majority vote. A quorum of this Committee shall be a simple majority of members. The concurring votes of a majority of those members present shall be sufficient to take action as a Committee. The Committee may also consider a matter serially, by voting in writing, or in a combination of members present or voting serially. The concurring votes of a simple majority of members shall be sufficient to take action.

B. CHAIRMAN'S SUBCOMMITTEE

The Chairman's Subcommittee is responsible for the following:

1. Tactical asset decisions including short-term investment shifts between or within asset classes made to take advantage of market mispricings.

2. The hiring and termination of managers.
3. Fund administrative matters.
4. Reviewing performance.

The Subcommittee will report on its actions to the TIC in writing.

The Chairman's Subcommittee consists of members selected by the TIC Chairman. Meetings shall be held a minimum of once per quarter and as needed. The Subcommittee currently has four members. Any two members present shall be a quorum. If there are two or three members present, the concurring votes of two members shall be sufficient to decide a matter. If all members of the Subcommittee are present, the concurring votes of three members shall be sufficient to decide a matter. The Subcommittee may also consider a matter serially, by voting in writing, in which case, the concurring votes of a simple majority shall be sufficient to decide the matter.

C. PENSION INVESTMENTS STAFF

It is the Staff's responsibility to:

1. Prepare recommendations on the following: the hiring and termination of managers; the amount to be allocated to each manager; tactical asset allocation shifts; changes in investment policy and strategy; and methods for controlling risk;
2. Conduct the administrative business of the plan;
3. Monitor the performance of the total fund;
4. Monitor the performance and process of each investment manager;

5. Report on the manager's performance periodically; and

6. Monitor the financial markets, and provide advice regarding investment techniques, principles and tools, including in-house management, for the effective management of the fund.

The Staff will report to the TIC and Chairman's Subcommittee in a timely manner.

Effective January 12, 1995

[Attorney Names & Addresses Omitted]

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Case No. CV 07-5359 SVW (AGRx)

GLENN TIBBLE, ET AL.,
Plaintiffs,

v.

EDISON INTERNATIONAL, ET AL.,
Defendants.

DEFENDANTS' CORRECTED STATEMENT OF UNCONTROVERTED FACTS AND CONCLUSIONS OF LAW IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

[Filed June 17, 2009]

Pursuant to Rule 56-1 of the Local Rules of the United States District Court for the Central District of California, defendants Edison International, Southern California Edison Company, Southern California Edison Company Benefits Committee (incorrectly named by Plaintiffs as the "Edison International Benefits Committee"), Edison International Trust Investment Committee, Edison International Trust Investment Committee Chairman's Subcommittee, Secretary of the Southern California Edison Company Benefits Committee, Southern California Edison

Company's Vice President of Human Resources, and Manager of Southern Edison Company's HR Service Center (collectively, the "Defendants"), hereby submit the following Corrected Statement of Uncontroverted Facts and Conclusions of Law in Support of Defendants' Motion for Summary Judgment ("SUF").

UNCONTROVERTED FACTS

* * *

Plan Committees

	Uncontroverted Fact	Citation
40	In March 2008, the Plan was amended to reflect that the named fiduciaries to the Plan are (1) the SCE Benefits Committee and its members; and (2) the Edison International ("EIX") Trust Investment Committee ("TIC") and its members. The Plan was further amended to change all references of "HR Service Center" to "Benefits Administration."	Decker Decl. Ex. CC (March 27, 2008 Benefits Committee Resolution); Decker Decl. Ex. DD, at SCE099996, SCE099998.
41	The Benefits Committee is the Plan Administrator for the 401(k) Plan and "has oversight about how the 401(k) plan is operated and administered."	Decker Dep. I at 44:12-20; Decker Decl. Ex. DD, at SCE099996.

42	The Benefits Committee has responsibility for adopting plan amendments and monitoring the service providers to the Plan.	Decker Dep. I at 44:20-23.
43	EIX also has a Benefits Committee, but that body is responsible only for benefit plans that have solely non-SCE (i.e., non-utility) participants in the plans. Thus, their responsibilities would not extend over the Plan at issue.	Decker Dep. I at 209:17-210:7.
44	Since 2001, the TIC has had the fiduciary duties and responsibilities for management of the Plan's assets, pursuant to delegation from the SCE Board of Directors.	Decker Decl. Ex. M, at SCE2-E00131260 (December 2000 SCE Board of Directors Resolution).
45	The TIC is responsible for "establishing investment policy and guidelines, hiring and terminating trustees [and] such other actions with respect to the management and oversight of the trust assets that it deems necessary or	Decker Decl. Ex. M, at SCE2-E00131257 (December 2000 EIX Board of Directors Resolution); *see also* Noonan Dep. at 32:22-34:1; Decker Dep. II at SCE008248.

	appropriate in its discretion."	
46	Pursuant to an EIX Board of Directors Resolution in December 2000, the TIC delegated certain investment responsibilities for the management of the Plan's assets to TIC Chairman's Subcommittee ("the Sub-TIC").	Noonan Dep. at 32:22-34:1; Decker Decl. II at SCE008248; Decker Decl. Ex. M, at SCE2-E00131257-SCE2-E00131258 (December 2000 EIX Board of Directors Resolution).
47	The Sub-TIC was established, in part, to "have a focus on the professional manner, professional financial people to focus on specific aspects, such as fund and manager performance and more of the technical aspects of the funds than the broader group."	Fohrer Dep. at 57:5-21.
48	Pursuant to the Board resolution delegating such authority to the Sub-TIC, at least two members of the TIC must also serve on the Sub-TIC.	Decker Decl. Ex. M, at SCE2-E00131257 (December 2000 EIX Board of Directors Resolution).
49	The TIC and Sub-TIC (collectively "the Committees") receive ongoing reports regarding	Noonan Dep. at 17:12-15, 31:5-32:5.

	Plan investments and their performance from the Investments Staff.	
50	The TIC or Sub-TIC generally meets at least once each quarter.	Ertel Dep. at 43:14-44:1.
51	Both the Benefits Committee and TIC members receive training about their roles and responsibilities and their fiduciary duties to the Plan participants, and are subject to review, ultimately, by Edison's respective Boards of Directors.	Frank Dep. at 31:22-32:8; Whitley Dep. at 128:24-130:2; Decker Decl. Ex. EE, at SCE100524-SCE100528, SCE100530 (Fiduciary Guidelines Manual for Benefits Committee); Decker Decl. Ex. M, at SCE2-E00131257 (Resolution of the Board of Directors of Edison International, December 14, 2000); Decker Decl. Ex. FF, at SCE105277-SCE105320, SCE105435-SCE105470 (TIC Committee Chairman's Subcommittee Investment Policy, Objectives & Guidelines).

Prudent Selection and Monitoring of Investment Options

	Uncontroverted Fact	Citation
52	The Plan's investment options include a variety of funds with different risk levels to meet the needs of all participants, including mutual funds and commingled or collective trusts, and these funds encompass a money market fund, bonds, U.S. equities, non-U.S. equities, company stock and balanced funds.	Ertel Dep. at 204:17-205:1; Tong Dep. at 20:7-24; *see also* Decker Decl. Ex. C, at SCE000443-SCE000485; Decker Decl. Ex. LL (Portfolio News showing the Plan's design to provide options for participants with different risk levels).
53	Edison's intent was to "pick funds that [met] the criteria [i.e., well managed, funds are properly segregated, properly reported, professional managed] – but to meet the expectations and desires of the employees in terms of a range of funds that allow them to put their money in a way that is best for them."	Fohrer Dep. at 54:7-56:5.
54	Hewitt Financial Services provides the Investments Staff with	Ertel Dep at 35:23-36:3; Hess Dep. at 88:13-90:6; *see also*

	investment consulting regarding the Plan, including the selection of investment options.	Tong Dep. at 54:22-57:16, 88:9-17.
55	The Investments Staff received investment reviews from Hewitt Financial Services on a quarterly and annual basis.	Ertel Dep. at 37:3-9.
56	The Investments Staff communicated with Hewitt Financial Services on an as-needed basis to discuss specific investment option issues.	Ertel Dep. at 37:10-14; 37:22-38:5.
57	Hewitt Financial Services sends monthly performance reviews to the Investments Staff measuring the performance of the Plan's funds compared to benchmarks.	Ertel Dep. at 109:16-18.
58	The Investments Staff consult with Russell Investment Group ("Russell") regarding asset management and the funds' investment managers.	Ertel Dep. at 38:15-22, 39:5-10; Clarke Dep. at 14:13-16.
59	The Investments Staff meets with Russell on a quarterly basis to	Ertel Dep. at 38:15-22, 39:5-10.

	evaluate the performance of Russell funds.	
60	One of the reasons that mutual funds are advantageous investment options and included in the Plan because participants can easily track the performance of funds using information that is easily available to the public.	Tong Dep. at 193:23-94:12; Ertel Dep. at 162:1-7.
61	Before making recommendations to the Committees regarding fund changes, the Investments Staff relies on several criteria to determine whether a fund is suitable for the Plan, such as the stability of the overall organization , the investment process or style used in the fund, the fund's performance, and the availability of public information regarding the fund.	Ertel Dep. at 163:24-165:3, 219:18-24, 259:5-8; Tong Dep. at 49:21-50:12.
62	The Investments Staff also evaluates the fund's total expense ratio compared to peer funds.	Ertel Dep. at 168:11-17, 263:12-25; Tong Dep. at 50:20-51:1, 158:24-159:19.

63	Fund performance was evaluated by the Investments staff versus benchmarks and peer funds on a net-of-fees basis.	Ertel Dep. at 168:11-17.
64	Absent extenuating circumstances, Ertel attends all of the Committees' meetings and he or one of the other members of the Investments Staff presents information regarding the Plan's overall performance.	Ertel Dep. 43:6-13; Tong Dep. at 45:9-19, 46:8-13, 18-25; *see also* Ertel Decl. Ex. I, at SCE006406 (July 16, 2003 TIC presentation).
65	The Investments Staff conducts presentations regarding the Plan's general performance and the removal, replacement and addition of funds at the Committees' meetings.	Tong Dep. at 49:21-50:12, 53:2-10.
66	The Investments Staff reviewed Edison's investment criteria during each Plan fund evaluation/selection presentation given to the Committees.	Ertel Dep. at 86:2-12, 87:4-10, 88:2-7, 260:18-22, 262:1-9; *see also* Ertel Decl. Ex. I, at SCE006409 (July 16, 2003 TIC presentation).
67	The Investments Staff strictly adhered to investment criteria when making invest-	Ertel Dep. at 87:11-17; Tong Dep. at 277:3-7.

	ment recommendations to the Committees.	
68	The Committees knew that the investment criteria listed in the presentations were used by the Investments Staff when making fund recommendations.	Tong Dep. at 275:7-14, 275:22-276:9; *see also* Ertel Decl. Ex. I, at SCE006409 (July 16, 2003 TIC presentation).
69	The final authority regarding investment decisions for the Plan (i.e. terminating funds and selecting replacement funds) laid with the Plan fiduciary committees; the Investments Staff did not have the authority to make decisions regarding fund changes.	Ertel Dep. at 59:16-60:3; Tong Dep. at 277:8-12.
70	If an investment option was no longer meeting the investment criteria, the Investments Staff would recommend replacement of the fund to the Committees.	Ertel Dep. at 165:4-12.
71	The T. Rowe Price Science and Technology Fund had a four-star Morningstar rating at the time of the collective bargaining agreement negotiations.	Ertel Decl. Ex. P, at SCE095216.

72	When the T. Rowe Price Science and Technology Fund was added to the Plan at the time of the collective bargaining agreement negotiations, Ertel determined the fund to be a prudent investment option and recommended that it be included in the Plan.	Ertel Dep. at 223:20-226:20.
73	In early 2002, the Investments Staff recommended the freezing of the T. Rowe Price Science & Technology Fund after identifying that it had been underperforming, and then, a year later, recommended completely removing the fund from the Plan.	Ertel Dep. at 202:17-203:21; Ertel Decl. Ex. Q, at SCE-E00164805.
74	The Committees elected to freeze the T. Rowe Price Science and Technology Fund rather than immediately terminating the fund, while adding an alternative, comparable fund, largely because of the recognition that so many participants had chosen to invest in the	Ertel Dep. at 208:22-209:13; Decker Dep. II at 42:14-43:12.

	T. Rowe Price Science and Technology Fund and the resulting concern about mapping all of them to the replacement fund.	
75	The Investments Staff conducted their own research in addition to reviewing and considering the information supplied by Hewitt. Hewitt provided information such as "short and long-term performance, annualized performance, as well as calendar year," "risk," "deviation from benchmark in the peer groups," and "alpha, beta, tracking issues."	Ertel Dep. at 164:19-25; Tong Dep. at 58:13-21; Hess Dep. at 119:4-121:10.
76	The Investments Staff also reviewed information from other resources, such as Morningstar reports and internet resources, when evaluating fund performance.	Tong Dep. at 58:1-12.
77	The Investments Staff closely monitored funds which were experiencing a change in investment managers.	Ertel Dep. at 104:19-105:4.

78	The Investments Staff closely monitored funds whose organizations experienced deterioration in financial condition.	Ertel Dep. at 105:5-13.
79	Before recommending to the Committees that a fund be replaced or removed, the Investments Staff tracked the fund's performance through their own research and after placing the fund on the Watch List that was presented to the Committees.	Ertel Dep. 107:8-17, 110:2-7; *see also* Ertel Decl. Ex. I, at SCE006417 (July 16, 2003 TIC presentation).
80	The Investments Staff determined which funds should be placed on the Watch List and which funds to recommend to the Committees for removal.	Ertel Dep. at 110:2-6; Hess Dep. 123:22-124:10, 127:2-9.
81	The Investments Staff selected benchmarks used to evaluate fund performance for presentations to the Committees.	Ertel Dep. at 111:19-22; Tong Dep. at 159:7-15, 160:14-19.
82	The Committees ask the Investments Staff questions about their recommendations.	Tong Dep. at 60:22-61:10.

83	On occasion, the Committees have disagreed with the Investments Staff's recommendations.	Tong Dep. at 74:19-23, 77:6-11.
84	Union approval was required before executing major changes to the Plan, such as changing several of the investment options at once.	Ertel Dep. at 139:24-140:2; Tong Dep. at 229:9-15.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Case No. CV 07-5359 SVW (AGRx)

GLENN TIBBLE, ET AL.,
Plaintiffs,

v.

EDISON INTERNATIONAL, ET AL.,
Defendants.

FURTHER ORDER DENYING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT; ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT IN PART

[Filed July 31, 2009]

I. INTRODUCTION

On July 17, 2009, the Court issued an Order Denying Plaintiffs' Motion for Partial Summary Judgment and Granting Defendants' Motion for Summary Judgment in Part ("July 17 Order"). The Court ordered supplemental briefing on Plaintiffs' prohibited transaction claims arising out of the float that State Street retained on Plan assets pending distribution to the Plan participants. Having now considered the parties' supplemental briefing, the Court GRANTS summary judgment for Defendants on Plaintiffs' prohibited transaction claims arising out of float. The Court also clarifies its earlier ruling and GRANTS summary judgment for Defendants for all

other claims arising out of State Street's retention of float. The Court finds, however, that a triable issue exists as to whether the fees from the Money Market fund were imprudent.

II. ANALYSIS

A. State Street's Retention of Float – Prohibited Transactions

The Court ordered supplemental briefing on two issues: (1) whether the defendant fiduciaries caused the Plan to engage in a transaction that allowed State Street to use assets of the Plan in State Street's own benefit in violation of 29 U.S.C. § 1106(a)(1)(D); and (2) whether the defendant fiduciaries dealt with the assets of the Plan in their own interest by virtue of State Street's retention of float in violation of § 1106(b)(1).

1. § 1106(a)(1)(D)

With respect to the first claim, ERISA makes it per se illegal for a "fiduciary with respect to a plan" to "cause the plan to engage in a transaction, if he knows or should know that such transaction constitutes a direct or indirect transfer to, or use by or for the benefit of a party in interest, of any assets of the plan." *Id.* § 1106(a)(1)(D).

In the July 17 Order, the Court noted that the "party in interest" here is State Street, which is allegedly using the assets of the Plan for its benefit by earning interest on those assets pending distribution of the assets to the Plan participants. The Court noted, however, that it was unclear what transaction Plaintiffs identified as constituting a "transfer to, or use by" State Street of Plan assets. Because Plaintiffs had not specifically identified which transaction Plaintiffs formed the basis for the alleged prohibited transaction, the Court was also unable to identify

which defendant fiduciary caused the Plan to engage in the transaction. The only transaction that the Court identified was the Trust Agreement that was entered into between SCE and State Street in 1999. As the Court noted, however, because this transaction occurred in 1999, it was outside the six-year statute of limitations period. Therefore, the Court ordered Plaintiffs to "identify with specificity the transactions at issue and which fiduciary was allegedly responsible for such conduct." (Docket No. 295, at 93.)

Plaintiffs' supplemental brief now makes Plaintiffs' theory clear. Plaintiffs contend that SCE and its corporate officers allowed State Street to use assets of the plan for State Street's own benefit because SCE failed to monitor or negotiate the amount of float that State Street could retain. (See Pl.'s Supp. Brief, at 4, 5.) Plaintiffs contend that the operative transaction occurred "each time that State Street sent an invoice for payment by failing to recapture float for the benefit of the Plan or even to negotiate the amount of float retained by State Street." (*Id.* at 4.)

In light of this explanation, Plaintiffs' prohibited transaction claim under § 1106(a)(1)(D) fails because Plaintiffs have not demonstrated how SCE caused the Plan to engage in a "transaction" with respect to State Street's retention of float. "[I]n order to sustain an alleged transgression of [§ 406(a)(1)], a plaintiff must show that a fiduciary caused the plan to engage in the allegedly unlawful transaction." *Lockheed Corp. v. Spink*, 517 U.S. 882, 888 (1996). The first element of such a claim is that there must be a "transaction." *See id.* at 892-893. Such "transactions" include "the 'sale,' 'exchange,' or 'leasing' of property, the 'lending of money' or 'extension of credit,' the

'furnishing of goods, services, or facilities,' and the 'acquisition of any employer security or employer real property,' with a party in interest." *Id.* at 893 (citations omitted). As the Supreme Court has noted, "[t]hese are commercial bargains that present a special risk of plan underfunding because they are struck with plan insiders, presumably not at arm's length." *Id.* The "transactions" that are prohibited by this subsection "generally involve uses of plan assets that are potentially harmful to the plan." *Id.* The second element of a § 1106(a)(1)(D) violation is that the fiduciary in question must have caused the Plan to engage in the transaction in question. *See Lockheed*, 517 U.S. at 889 n.3 (noting that a § 1106(a)(1)(D) violation "requires a showing that a fiduciary caused the plan to engage in the transaction in question").

Here, Plaintiff has not identified a single "transaction" within the six-year limitations period that could form the basis for a § 1106(a)(1)(D) prohibited transaction. Plaintiffs argue that there was a transaction "each time that State Street sent an invoice for payment" to SCE. (Pl.'s Supp. Brief, at 4.) Even if State Street's sending an invoice to SCE is a "transaction" (the exchange of money for services), the Plan was not engaged in the transaction in question – the Plan was not a party to the contract between State Street and SCE. Thus, Plaintiff cannot prove that SCE caused the Plan to engage in the transaction in question.

Plaintiffs also argue that SCE engaged in a prohibited transaction by failing to recapture the float for the benefit of the Plan. SCE's alleged failure to act, however, cannot constitute a "transaction" for the purposes of § 1106(a)(1)(D). In *Wright v. Oregon Metallurgical Corp.*, 360 F.3d 1090 (9th Cir. 2004),

the plaintiffs argued that the defendant fiduciary's decision not to sell certain stock violated § 1106(a)(1)(D). *Id.* at 1101. The Ninth Circuit found, however, that the plaintiffs failed to identify any "transaction" because the plaintiffs "pointed to nothing akin to a 'sale, exchange, or leasing of property, [or] the lending of money or extension of credit,' all commercial bargains defined by the Supreme Court in Lockheed as falling under § 1106." *Id.* The court found that "[t]he decision by the [defendants] to *continue* to hold 15% of Plan assets in employer stock was not a 'transaction.'" *Id.* (emphasis in original).

Much like *Wright* where the court found that the decision not to sell stock was not a "transaction," here, SCE's failure to recapture the float for the benefit of the Plan was not a "transaction" that could form the basis of a § 1106(a)(1)(D) violation. The failure to recapture float is not the kind of commercial bargain contemplated by the statute that "involve uses of plan assets that are potentially harmful to the plan." *See Lockheed*, 517 U.S. at 893. Thus, Plaintiffs' prohibited transaction claim under § 1106(a)(1)(D) fails as a matter of law.

2. § 1106(b)(1)

With respect to the second claim, ERISA makes it per se illegal for a "fiduciary with respect to the plan" to "deal with the assets of the plan in his own interest or for his own account." 29 U.S.C. § 1106(b)(1). Plaintiffs' § 1106(b)(1) claim fails, however, because Plaintiffs have not identified any conduct by Defendants in the statutory time period that amounts to a "transaction" or a "deal[ing]" with the assets of the plan in SCE's own interest or for SCE's own account.

As the Court noted in its July 17 Order, Plaintiffs might have been able to state a claim by arguing that SCE obtained an artificially low $150,000 per year base fee for State Street's trustee services, on account of the fact that State Street would be able to retain float. However, the operative "transaction" upon which this arrangement is based was the Trust Agreement between State Street and SCE, the Trust Agreement, was signed in 1999, which was outside of the six-year limitations period. Thus, even if SCE "actually used its power to deal with the assets of the plan for its own benefit" in connection with the 1999 Trust Agreement, Plaintiffs' claim is barred by the six-year statute of limitations. *See Acosta v. Pacific Enters.*, 950 F.2d 611, 621 (9th Cir. 1992).[1]

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[1] The Court rejects Plaintiffs' argument that this case is analogous to *Martin v. National Bank of Alaska*, 828 F. Supp. 1427 (D. Alaska 1992). In *Martin*, the fiduciary bank entered into service agreements with the plan outside of the statute of limitations period. *Id.* at 1431. At a later date, the fiduciary bank then made loans out of the plan assets to third parties and the fiduciary bank earned origination fees in connection with those loans. *Id.* at 1430. These loans to third parties were made within the applicable statute of limitations period. *Id.* at 1432. The fiduciary bank argued that the prohibited transaction claims were barred by the statute of limitations because the operative transaction was the act of entering into the service agreements. *Id.* The court found that although the service agreements were barred by the statute of limitations, the self-dealing claims based on the loans to the third parties were not barred. *Id.*

Unlike *Martin*, however, Plaintiffs have not pointed to any such subsequent transaction within the statute of limitations period that could form the basis of a prohibited transaction claim. In *Martin*, the subsequent transaction was the making of loans out of plan assets. Here, however, Plaintiffs have identified no such transaction, but merely argue that Defendants failed to recapture the float for the benefit of the Plan. Plaintiffs' claim in this regard resembles a continuing violation theory

Subsequent to the Trust Agreement in 1999, however, Plaintiffs have not identified any conduct on the part of SCE that could give rise to a prohibited transaction under § 1106(b)(1). Plaintiffs' theory is that despite the fact that SCE was made aware of the fact that State Street was collecting income from float, SCE "never acted to monitor the float or to negotiate limits upon State Street's receipt of it." (Pl.'s Supp. Brief, at 6.) Plaintiffs argue that by "failing to act," SCE engaged in a prohibited transaction. (*Id.*)

As explained above, however, a fiduciary's failure to act cannot form the basis for a prohibited transaction under § 1106. *See Wright*, 360 F.3d at 1101. Instead, the plaintiff must show that the defendant fiduciary engaged in "self-dealing" by "actually us[ing] its power to deal with the assets of the plan for its own benefit or account." *Acosta*, 950 F.2d at 621. Here, Plaintiffs have not pointed to any evidence that SCE dealt with the assets of the Plan in its own interest during the statutory time period. Thus, Plaintiffs' claim fails as a matter of law.

3. Notice Pleading

Plaintiffs' prohibited transaction claims arising out of State Street's retention of float also fail because Plaintiffs did not sufficiently allege these claims in the Second Amended Complaint. Rule 8(a)(2) of the Federal Rules of Civil Procedure requires a "short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). The plaintiff's complaint "must contain sufficient factual matter, accepted as true, to 'state a claim to

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that the Ninth Circuit rejected in *Phillips v. Alaska Hotel & Rest. Employees Pension Fund*, 944 F.2d 509, 520 (9th Cir. 1991).

relief that is plausible on its face.'" *Ashcroft v. Iqbal*, __ U.S. __, 129 S.Ct. 1937, 1949 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* A complaint that offers mere "labels and conclusions" or "a formulaic recitation of the elements of a cause of action will not do." *Id.*; *see also Moss v. U.S. Secret Service*, __ F.3d __, 2009 WL 2052985, at *5 (9th Cir. 2009) (citing *Iqbal*, 129 S.Ct. at 1951).

Plaintiffs' prohibited transaction claims arising out of State Street's retention of float do not satisfy the pleading requirements under Rule 8. Plaintiffs' only allegation in the Complaint is that Defendants breached their fiduciary duties by "engaging in, and causing the Plan to engage in, prohibited transactions in violation of ERISA § 406." (SAC ¶ 105(K).) This conclusory statement does not identify any specific transactions or identify which fiduciary was supposedly responsible for entering into the transaction. Thus, Defendants' Motion for Summary Judgment is granted with respect to State Street's retention of float on the alternative basis that Plaintiffs did not adequately plead these prohibited transaction claims.

B. Remaining Claims

Plaintiffs contend that they still have viable claims for breach of fiduciary duty under § 1104(a) arising out of State Street's retention of float. Plaintiffs recognize, however, that, in their original motion, Defendants moved for summary judgment "on any claims with respect to float." (Pl.'s Supp. Brief, at 2; Def.'s S.J. Mot., at 20.) Having moved for summary judgment on all claims arising out of State Street's

retention of float, the burden shifted to Plaintiffs to point to evidence that would create a triable issue of fact with respect to Plaintiffs' claims arising out of float. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986); *Carmen v. San Francisco Unified Sch. Dist.*, 237 F.3d 1026, 1029 (9th Cir. 2001) ("The district court need not examine the entire file for evidence establishing a genuine issue of fact, where the evidence is not set forth in the opposing papers with adequate references so that it could be conveniently found."). Plaintiffs' opposition to Defendants' motion for summary judgment, however, does not point to specific evidence to create a triable issue of fact on Plaintiffs' § 1104(a) fiduciary duty claims. Plaintiffs' opposition is virtually silent with respect to claims arising out of State Street's retention of float. Furthermore, Plaintiffs have conceded that State Street's fees were not unreasonable, with or without float. (Pl.'s S.J. Mot., at 23 n.22.) Thus, Defendants' Motion for Summary Judgment is granted with respect to all remaining claims arising out of State Street's retention of float.

Plaintiffs also note that the Court did not address Plaintiffs' claim for breach of fiduciary duty with respect to the fees the Plan paid to the Money Market fund in the Court's July 17 Order. Plaintiffs contend that they have an independent claim for breach of the duty of prudence because Defendants chose a money market fund that charged $2.1 million in fees. Indeed, in Plaintiff's opposition to Defendants' Motion for Summary Judgment, Plaintiffs cite with specificity to the expert report of Mr. Pomerantz, who opines that the fees charged to the Money Market fund were excessive because from 1999, to 2005, the Money Market fund in the Plan charged a fee of 18 basis points. (Pl.'s Opp'n, at 18

(citing Pomerantz Rep. ¶ 53).) Mr. Pomerantz opines that a fee of 18 basis points was twice the fee that should have been negotiated. (*Id.*) Plaintiffs cite to an email sent from an employee at Hewitt to a member of the Investments Staff informing the Investments Staff member that the Plan could be paying only 9 basis points for a comparable money market fund. (*Id.* ¶ 53 n.105.) Mr. Pomerantz also notes that Vanguard offered a Money Market fund that charged a fee of only 8 basis points. (*Id.* ¶ 53.)

In response, Defendants offer only the declaration of Mr. Ertel who states that the Money Market fees were periodically renegotiated. (Ertel Decl. ¶ 5.) Mr. Ertel also makes the conclusory statement that the fees charged by the Money Market fund were comparable to fees paid for similar money market funds. (*Id.*) Defendants, however, do not explain why the Plan was paying a fee of 18 basis points instead of a money market option that charged a fee of only 9 basis points. Thus, a triable issue exists as to whether the amount of fees charged by the Money Market fund was imprudent in violation of § 1104(a)(1)(B).

III. CONCLUSION

For the reasons stated above, Defendants' Motion for Summary Judgment is GRANTED with respect to all claims arising out of State Street's retention of float. Defendants' Motion is DENIED, however, with regard to the reasonableness of the fees charged to the Money Market fund.

The Court sets a bench trial for October 13, 2009, at 9:00 am. The pretrial conference will be held on October 5, 2009, at 3:30 pm.

IT IS SO ORDERED.

DATED: July 31, 2009 /s/ STEPHEN V. WILSON
STEPHEN V. WILSON
UNITED STATES
DISTRICT JUDGE

[Attorney Names & Addresses Omitted]

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

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GLENN TIBBLE, ET AL.,
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DIRECT TESTIMONY OF ROBERT C. BOADA

[Filed Oct. 5, 2009]

I, Robert C. Boada, being duly sworn on my oath, declare and state:

1. In this Declaration, I set forth my personal knowledge or my opinions based on my knowledge and experience.

2. I began my employment at Southern California Edison Company ("SCE") in March 1984 and am currently employed as SCE's Vice President and Treasurer. I was elected Treasurer in January 2000 and was elected Vice President and Treasurer in January 2001. Prior to my election as Treasurer in 2000, I was the Director of Corporate Financial Planning. Prior to that, I held several other management positions in SCE's Treasurer's Department.

3. I received a Bachelor of Science degree in Economics and Biology from the University of California, Los Angeles in 1980. I also earned a Master of Business Administration degree with an emphasis in Finance and Corporate Accounting from the University of Rochester's William E. Simon Graduate School of Business Administration in 1984. In addition, in 1996, I obtained the designation of Chartered Financial Analyst ("CFA"), which requires an ongoing standard of practice compliance requirement as it relates to investment standards applicable to my role in investment management including responsibilities in a corporate environment.

4. I have been a participant in the Edison 401(k) Savings Plan ("the Plan"), which was formerly known as the SCE Stock Savings Plus Plan ("SSPP"), since the mid-1980s.

The Investment Committees of the Edison 401(k) Savings Plan

5. Edison International ("EIX") is SCE's parent company (collectively, "Edison"). Pursuant to delegation from Edison's Boards of Directors, the Edison International Trust Investment Committee (the "TIC") and its Chairman's Subcommittee (the "Sub-TIC") (collectively, the "Investment Committees") have been the Plan fiduciaries who have selected and monitored the Plan's investment options since 2001.

6. One or both of the Investment Committees has generally met each quarter since 2001.

7. I have been a member of the EIX Sub-TIC from its establishment in 2001 through the present. I have been a member of the TIC since 2005.

8. No member of the TIC or Sub-TIC has simultaneously served on the Board of Directors of SCE or

EIX while serving as a member of the TIC or Sub-TIC.

9. I understand that, as a member of the Investment Committees, it is my responsibility to make investment management and related decisions in the best interest of the Plan participants. I received orientation materials describing my roles and responsibilities as a Plan fiduciary. I have also been trained thereafter from time to time about fiduciary duties. I also receive training on fiduciary duties in connection with the annual recertification of my CFA designation.

The Selection and Monitoring of the Plan's Investment Options

10. David Ertel serves as SCE's Director of the Investments Division of the Treasurer's Department and has reported to me since 2000. Mr. Ertel and his staff are often referred to as the "Investments Staff." The Investments Staff assist the Investment Committees with investment issues related to SCE benefit trusts. In this capacity, the Investments Staff provide information and recommendations to the Investment Committees regarding the investment options in the Plan and possible alternatives.

11. On a quarterly basis, the Investments Staff provides the Investment Committees reports regarding the performance and related status of the assets of the Plan as a whole. When advisable, the Investments Staff also provides updates regarding the performance of specific funds and their investment managers and recommendations regarding the possible removal or addition of investment options. Prior to these meetings, Mr. Ertel and I generally communicate about what the Investments Staff intends to present or recommend.

12. When making recommendations to the Investment Committees on fund evaluation or selection, the Investments Staff reviews the investment criteria for Plan, which include: (1) the stability of the fund's overall organization; (2) the fund's investment process; (3) the fund's performance compared to benchmarks and peer groups; (4) the fund's total expense ratio; and (5) with respect to mutual funds, the availability of public information (collectively, the "Investment Criteria"). The Investment Criteria do not include revenue sharing. I know that the Investment Criteria are reviewed with the Investment Committees both because I generally preview the presentations before the Investment Committee meetings, and because, as a member of the Investment Committees, I attend these meetings and witness the Investments Staff's presentation of the Investment Criteria for fund option recommendations.

13. Although the Investment Committees have the authority and responsibility to monitor and select individual investment options for the Plan, it is my understanding that, pursuant to delegation from the SCE Board of Directors, the SCE Benefits Committee has authority over the structural components of the Plan, such as the investment fund structure.

14. The Investment Committees currently seek to maintain a line-up of Plan investment options that complies with the investment fund structure adopted in 1998 and 1999: 10 core options and approximately 40 mutual funds covering a variety of asset classes, including specialty funds such as real estate, technology and utility sector funds. It is my understanding that at this time the Investment Committees cannot change this investment fund structure that was established by negotiations with Edison bargaining units for unionized employees. However, the

collective bargaining agreements do not prevent the Investment Committees from removing individual investment options that do not satisfy the Investment Criteria and adding replacement funds that satisfy the Investment Criteria.

15. As mentioned above, a fund's total expense ratio is one of the Investment Criteria, while revenue sharing is not. When evaluating a mutual fund, the Investment Committees do not consider whether the mutual fund will make revenue sharing payments to Hewitt Associates LLC, the Plan's recordkeeper, or its affiliates (collectively, "Hewitt").

16. If an investment option in the Plan line-up no longer performs consistently with the Investment Criteria, the Investments Staff will recommend to the Investment Committees that the fund either be placed on a "watch list" for closer scrutiny or be removed.

17. Before making any recommendation regarding the addition or termination of an investment fund, the Investments Staff is responsible for completing due diligence regarding how the fund does or does not meet the Investment Criteria. The Investment Committees discuss Investments Staff recommendations at Investment Committee meetings, including issues such as why one investment fund is better than another. The Investment Committees sometimes request that the Investments Staff conduct additional investigation and research regarding the basis for its recommendation and provide an additional presentation outlining its findings. The Investment Committees do not automatically accept, and have periodically rejected, the Investments Staff's recom-

mendations. Trial Exhibits 55, 277, and 1004[1] are minutes from Investment Committee meetings during which members of the Investment Committees questioned the Investments Staff's recommendations or chose not to adopt its recommendations to select or terminate a fund.

18. The Investment Committees have the discretion and final authority to adopt or reject the Investments Staff's recommendations. The Investments Staff has no authority to make decisions regarding fund changes, and no member of the Investments Staff is also a member of the Investment Committees.

The Investment Management Fees for the Money Market Fund Were Reasonable

19. The Plan's investment options include a Money Market Fund which is managed by State Street Global Advisors, a division of State Street Bank and Trust Company, the Plan's trustee.

20. The Investment Committees rely on the Investments Staff to consistently monitor the performance, net of fees, of the Money Market Fund. The Investment Committees have always understood the Investments Staff to consider the fees for the Money Market Fund reasonable. The Investment Committees have also always understood from the Investments Staff that the Money Market Fund is a well-structured, well-performing fund that meets the Investment Criteria and outperforms its benchmarks.

21. In 2008 and in response to the global financial crisis, the Investment Committees requested that the Investments Staff conduct an extensive review of the

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[1] These exhibits are attached to the Direct Testimony of David E. Ertel.

Money Market Fund. The goal of this review was to ensure that the Investment Committees were comfortable with the Money Market Fund's management and credit risk.

22. In early 2009, the Investments Staff sent an e-mail containing the results of its study to the Investment Committees. Based on these findings, the Investment Committees took no action regarding the Money Market Fund, as it continued to the meet the Plan's Investment Criteria, outperformed its benchmarks and was a reliable investment option to be included in the Plan.

I declare under penalty of perjury under the laws of the United States of America and pursuant to 28 U.S.C. § 1746 that the foregoing is true and correct and that this Declaration is executed this 5th day of October, 2009 in Rosemead, California.

/s/ ROBERT C. BOADA
Robert C. Boada

[Attorney Names & Addresses Omitted]

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

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GLENN TIBBLE, ET AL.,
Plaintiffs,

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EDISON INTERNATIONAL, ET AL.,
Defendants.

DIRECT TESTIMONY OF DAVID E. ERTEL

[Filed Oct. 5, 2009]

I, David E. Ertel, being duly sworn on my oath, declare and state:

1. In this Declaration, I set forth my personal knowledge or my opinions based on my knowledge and experience.

2. I have been employed as the Director of Investments at Southern California Edison Company ("SCE") since March 2008. Edison International is the parent company of SCE (collectively, "Edison"). Prior to my current position, I was the Manager of Investments from 1995 to March 2008. These positions are within SCE's Investments Division of the Treasurer's Department and, therefore, I reported to Mary Simpson, SCE's Assistant Treasurer, until 2006

and, since then, I have reported to Robert Boada, SCE's Vice President and Treasurer.

3. In total, I have 22 years of investment experience at SCE. I received my Bachelors in Economics and Masters in Business Administration from California State University, Los Angeles.

4. As Director of Investments, I am a member of and supervise SCE's Investments Staff, which includes Marvin Tong, Greg Henry, Linda Macias and Darleen Loose. The Investments Staff is responsible for monitoring and evaluating the investments for the Edison 401(k) Savings Plan ("the Plan"), which was formerly known as the SCE Stock Savings Plus Plan, as well as the investments for other trusts sponsored by Edison.

5. I have been a participant in the Plan since the early 1980s.

6. The Investments Staff does not have any authority over the administration of the Plan, the selection of the Plan's third-party service providers, or the selection of the Plan's investment options. Rather, the Investments Staff's involvement in the Plan is limited to monitoring the Plan's investment options and, when needed, making recommendations regarding changes to the Plan's investment option line-up to the Edison International Trust Investment Committee ("TIC") or its Chairman's Subcommittee ("Sub-TIC") (collectively, "the Investment Committees").

7. Pursuant to delegation from Edison's Boards of Directors, the Investment Committees have been the Plan fiduciaries who have selected and monitored the Plan's investment options since 2001. From 2001 to the present, no member of either Investment Committee has simultaneously served on the Board

of Directors of SCE or Edison International while serving as a member of either Investment Committee.

8. Members of the Investments Staff are not members of the Investment Committees and have no authority or control over the selection of the investment options in the Plan's line-up. The Investments Staff, however, monitors the performance of the Plan's investments and attends the Investment Committees' meetings. On a quarterly basis, the Investments Staff gives presentations to the Investment Committees regarding the Plan's overall performance. When advisable, the Investments Staff also present information regarding the performance of individual investment options and recommend changes to the Plan's investment option line-up, such as adding or terminating an investment option. The Investment Committees have the discretion to accept or reject our recommendations and add or remove investment options from the Plan's line-up.

The Investments Staff's Monitoring of the Plan's Investment Options

9. The Investments Staff and the Investment Committees monitor the performance of the Plan's investment options and ensure that the options included in the Plan meet the investment criteria for the Plan. The investment criteria that have been approved by the Investment Committees for evaluating investment options for the Plan include the following: (1) the stability of the fund's overall organization; (2) the fund's investment process; (3) the fund's performance compared to benchmarks and peer groups; (4) the fund's total expense ratio; and (5) with respect to mutual funds, the availability of public information regarding the fund (collectively, the "Investment Criteria"). These are the only crite-

ria used by the Investments Staff when evaluating the performance of funds included in the Plan.

10. Notably, revenue sharing is not and, has never been, an element or one of these Investment Criteria, and has never been part of the Investments Staff's analysis when deciding whether to recommend the termination or addition of an investment option. Revenue sharing arrangements allow mutual funds managers to use revenue from fees charged to investors to pay third-party services providers, such as Hewitt Associates LLC, the Plan's recordkeeper, or its affiliates (collectively, "Hewitt"). Some, but not all, funds in the Plan's line-up offer revenue sharing payments to Hewitt for performing services such as mailing prospectuses, maintaining individual account balances and providing participant statements.

11. In applying the Plan's Investment Criteria, the Investments Staff evaluates fund performance on a net-of-fee basis to ensure that relative performance comparisons among funds may be made on a consistent basis. The Investments Staff relies on a variety of sources to review the fund's performance and fees, including Hewitt Financial Services ("HFS") (the Plan's investment consultant and an affiliate of Hewitt), Frank Russell Trust Company or its affiliates (collectively, "Russell"), and other sources, such as Morningstar reports. The Investments Staff, in conjunction with HFS and Russell (for the Plan funds managed by Russell) also selects benchmarks for each investment option to determine if the investment options are meeting the Investment Criteria.

12. HFS provides the Investments Staff with written reports regarding the performance of the Plan's investment options on a monthly, quarterly and annual basis. These reports include short- and long-term performance, annualized performance, risk, and

performance of benchmarks and peer groups. Moreover, the Investments Staff confers with a representative from HFS on a quarterly basis to review the contents of the quarterly report and discuss any concerns regarding the performance of specific investment options. We also have an annual meeting with a representative from HFS during which we undergo a more in-depth analysis regarding the performance of the Plan's investment options. The Investments Staff also confers with HFS on an as-needed basis to discuss specific investment options; our interactions with HFS are not limited to the quarterly and annual reviews.

13. In addition to working with HFS, the Investments Staff also confers with Russell. Russell is the investment consultant for Edison's Pension Fund and, therefore, sometimes has information regarding specific investment managers associated with funds that are either in the Plan's line-up or are being researched by the Investments Staff. We communicate with Russell to incorporate any data it may have regarding a specific investment option or manager, as well as to evaluate the performance of Russell funds.

14. Finally, the Investments Staff conducts its own independent analysis regarding the performance of the Plan's investment options. This research includes using data from Morningstar, Financial Engines and other online sources to track the options' performance. Each of the Investments Staff's methods of gathering information (HFS, Russell and independent research) is used to determine whether the investment options in the Plan's line-up demonstrate continued compliance with the Investment Criteria.

15. The Investments Staff and Investment Committees aim to ensure that the Plan's line-up provides a range of investment options that are meeting the Investment Criteria. Moreover, the Investments Staff currently seeks to maintain a line-up with the variety of investment options Edison negotiated with participants' union representatives in 1998 and 1999: 10 core options and approximately 40 mutual funds covering a variety of asset classes, including specialty mutual funds such as real estate, technology and utility sector funds. The Plan's line-up provides options for investors with conservative, moderate and aggressive risk portfolios and represents a range of expense ratios, investment vehicles, and actively and passively managed options.

16. The Investments Staff places on a Watch List investment options that are in need of closer monitoring because the options' performance, change in management or deterioration in financial condition suggest that the options may fail to continue to meet the Investment Criteria. The Investments Staff shares the Watch List with the Investment Committees at the Investment Committees' meetings. If an investment option that has been placed on the Watch List fails to meet the Investment Criteria, the Investments Staff will recommend to the Investment Committees that the option be removed from the Plan's line-up. The Investment Criteria are also reviewed with the Investment Committees when we give our recommendations.

17. Similar to the process of removing an investment option from the Plan's line-up, the Investments Staff conducts a thorough review of the investment options it considers recommending be added to the Plan's line-up to ensure that any fund recommended to the Investment Committees meets the Investment

Criteria. Typically, a new investment option will be added when the Investment Committees decide to remove an investment option that no longer meets the Investment Criteria. When such a need arises, the Investments Staff confers with HFS and conducts independent research to identify investment options to recommend to the Investment Committees.

18. During our discussions with HFS, we request that HFS identify a small number of investment funds that would meet the Plan's needs. Sometimes the Investments Staff guides HFS' search for prospective investment options by specifying funds to be included in HFS' analysis. The Investments Staff does not automatically accept HFS' recommendations, but compares their recommendations with our independent findings. Once the Investments Staff identifies an investment option that meets the Investment Criteria, we present the Investment Committees with our recommendation that the investment option be added to the Plan's line-up.

19. The Investments Staff, however, does not recommend that the Investment Committees make changes to the Plan's line-up unless significant issues arise with respect to a particular Plan investment option. This practice was reflected in the Committees' June 30, 2003 meeting minutes, marked as Trial Exhibit No. 277. At that meeting, Tom Noonan, a member of the Investment Committees, expressed a preference for limiting the frequency of changes to the Plan's line-up. My understanding was that the purpose of this approach was to avoid confusing participants with numerous changes to the Plan's investment funds.

20. When the need arises for a mutual fund to be added, the Investments Staff generally recommends that the Investment Committees add the lowest fee

share class for that mutual fund, provided the Plan qualifies for that share class based on minimum initial investment requirements and the share class satisfies the Investment Criteria. There are instances in which a fund's lowest fee share class cannot be added because the fund in that share class does not meet the Investment Criteria or the assets available to invest in the fund do not qualify for the lowest fee share class. For example, in 2002, the Investment Committees decided to freeze the T. Rowe Price Science & Technology Fund, so as not to allow new investors. Since assets remained in the T. Rowe Price Science & Technology Fund, no assets were available to map into the replacement fund, the Dresdner RCM Global Technology Fund and, as I recall, the Plan did not qualify for the institutional share class. As a result, the Investment Committees also added a retail class of the Dresdner RCM Global Technology Fund to provide investors with an alternative to the frozen T. Rowe Price Science & Technology Fund. The Dresdner RCM Global Technology Fund was later renamed the PIMCO RCM Global Technology Fund. On numerous occasions, however, the Investments Staff's recommendations of funds in the lowest fee share class available have resulted in terminated funds being replaced by investment options that have lower levels of revenue sharing or no revenue sharing.

21. After the Investments Staff makes its recommendation and presents why the investment option should be removed or added, the Investment Committees may ask questions or choose not to adopt its recommendation. Trial Exhibits Nos. 55, 277, and 1004 are minutes from the Investment Committees' meetings during which members of the Investment Committees questioned our recommendations or chose

not to adopt the recommendations of the Investments Staff to select or terminate a fund.

Revenue Sharing Was Not Considered When Selecting Investment Options to Include in the Plan's Line-Up

22. As noted above, the Investment Criteria never included revenue sharing. Even when revenue sharing data was included in the presentation materials for an Investment Committee meeting – I can think of only one instance when that occurred – it was never even discussed, let alone factored into the Investment Committees' decision-making process. To illustrate, in the Investments Staff's July 16, 2003 presentation to the Investment Committees, we included in the presentation's back-up materials a table comparing the two lowest fee share classes available of six mutual funds the Investments Staff had recommended be added to the Plan at the Investment Committees' June 30, 2003 meeting. The table, included on page 249.0044 of Trial Exhibit No. 249, provided data on Morningstar ratings, fund inception dates, expense ratios, revenue sharng, and the public availability of information for those share classes. During our discussions with the Investment Committees at the June 30, 2003 and July 16, 2003 meetings, the discussion focused on the Investment Criteria, including the funds' total expense ratios; revenue sharing was not discussed. For three of those six mutual funds, the Investments Staff recommended at the June 30, 2003 meeting the share classes with no revenue sharing. For the other three mutual funds, the Investments Staff recommended at the June 30, 2003 meeting the share class that provided the smaller amount of revenue sharing. In each case, the Investments Staff's share class recommendation was based on the Investment Crite-

ria, including the total expense ratio, and did not consider revenue sharing. The Investments Staff's recommendations for all six mutual funds were approved by the Investment Committees at the June 30, 2003 meeting.

23. The 2003 fund changes listed in Trial Exhibit No. 249 are representative of the fund changes in the Plan from 2002-2008. Throughout this time period there were many instances where the Investment Committees decided to terminate funds and replace those funds with other investment options. The majority of these changes resulted in the selection of investment options in which the new fund offered less revenue sharing or the same amount of revenue sharing than the fund it replaced.

The Investments Staff's Communications with SCE's Human Resources Staff

24. Independent from the Investments Staff's communications with the Investment Committees, we periodically communicate with SCE's Human Resources staff regarding changes in the Plan's investment option line-up. On occasion, these communications with the Human Resources staff involve revenue sharing, since revenue sharing has an impact on the budget for the Plan that is overseen by Human Resources. For example on June 25, 2003, I wrote an e-mail to Lorie Padilla, one of SCE's Human Resources administrators, notifying her of two fund changes that the Investments Staff was planning to recommend to the Investment Committees which would involve terminating and transferring assets from funds offering revenue sharing to a fund in an institutional share class that had no revenue sharing. This e-mail is attached hereto as Trial Exhibit No. 162. In this e-mail I ask Ms. Padilla and others in the Human Resources Department about their

thoughts regarding the decrease in revenue sharing. Despite my framing of this information as a question, the Investments Staff had already substantially finalized its recommendation. My purpose was to alert the Human Resources staff of the changes and determine whether they had any issues. The Investments Staff proceeded with our recommendation, which was not impacted by and did not rely on Ms. Padilla's response or the comments of anybody on the Human Resources staff. The Investment Committees' approval of this recommendation at its June 30, 2003 meeting is included in Trial Exhibit No. 277. Similarly, in an e-mail dated March 11, 2003, I communicated with George Grana, another member of the Human Resources staff. This e-mail, attached to this Declaration as Trial Exhibit No. 52, in addition to discussing the timing of fund changes, also asked Mr. Grana if recommending the removal of funds that offer revenue sharing would be "acceptable on an incremental basis." Setting aside the awkward phrasing of my e-mail, the purpose of the communication was to alert the Human Resources staff of impending fund line up changes and learn if such changes would present problems from their viewpoint at an early stage. The communication in no way influenced the investment process. As discussed in paragraph 22, the Investments Staff made multiple recommendations at the June 30, 2003 Investment Committees' meeting that were approved by the Investment Committees and resulted in decreased revenue sharing.

25. Overall, although I recall multiple communications with Human Resources staff about fund changes, individuals on the Human Resources staff never pressed me to alter any investment recommendations to the Investment Committees because of revenue

sharing. This is not surprising since they lacked authority over the investment area, which rests within the Treasurer's Department, not Human Resources.

26. I am aware of an e-mail, dated June 24, 2003, that appears to be from me listing the factors thought to be the criteria used for selecting mutual funds for the Plan. This e-mail, attached as Trial Exhibit No. 78 states that "revenue sharing is favorable" is a criterion for selecting between share classes. I did not write this e-mail, and it is simply incorrect as a factual matter. The e-mail omits most of the Investment Criteria used by the Investments Staff. Furthermore, revenue sharing has never been considered by the Investments Staff when recommending investment options. In fact, six days after the June 24, 2003 e-mail in Exhibit No. 78, the Investments Staff made the recommendations discussed in paragraph 22 at the Investment Committees' June 30, 2003 meeting. For three of the recommended mutual funds, the Investments Staff recommended share classes with no revenue sharing. For the other three recommended mutual funds included in the table that is on page 249.0044 of Trial Exhibit No. 249, the Investments Staff recommended the available share class that provided the least amount of revenue sharing. In each case, the Investments Staff's share class recommendation was based on the Investment Committees' Investment Criteria, including the total expense ratio, and did not consider revenue sharing. The Investment Committees approved these share class recommendations at their June 30, 2003 meeting.

The Investment Management Fees for the Money Market Fund Were Reasonable

27. I understand from my experience that money market funds are common investment options for 401(k) plans and, in order to provide participants with a conservative investment vehicle, the Plan includes a money market fund. The Plan's Money Market Fund is managed by State Street Global Advisors ("SSgA"), a division of State Street Bank and Trust Company, the Plan's trustee. We receive monthly, quarterly, and annual reports from HFS discussing the Money Market Fund's performance. Many of these reports included information on the Money Market Fund's fees.

28. The Investments Staff consistently monitors the performance of the Money Market Fund. Such monitoring has indicated that the Money Market Fund has consistently exceeded its benchmarks, net of fees. Moreover, SSgA's services have met expectations and the fees for the Money Market Fund have been reasonable.

29. In 2008 and in response to the global financial crisis, the Investment Committees requested that the Investments Staff conduct an extensive review of the Money Market Fund. The goal of this review was to ensure that the Investment Committees were comfortable with the Money Market Fund's management and credit risk. During this review, the Investments Staff had discussions with SSgA and HFS regarding the investment process, risk control and performance of the Money Market Fund, in addition to conducting our own research.

30. In early 2009, the Investments Staff sent an e-mail containing the results of its study to the Investment Committees. Based on the findings, the Investment Committees took no action regarding the

Money Market Fund, as it continued to the meet the Investment Criteria, outperformed its benchmarks and was a reliable investment option to be included in the Plan. Moreover, HFS found that the Money Market Fund was a solid choice, confirming the Investments Staff's independent conclusions.

31. Moreover, HFS has provided reviews of the Money Market Fund's fees and according to their comparisons and research provided, as well as that conducted by the Investments Staff, the Money Market Fund's fees were not excessive. On several occasions beginning in 2005, the fees for the Money Market Fund have been reduced from 18 basis points per year in 2001 to the current rate of 8 basis points per year.

32. In 2005 I recall a discussion with Marvin Tong about the Money Market Fund's fees. He related a discussion with HFS, which suggested based on the increasing size of the assets invested in the Money Market Fund, there may be an opportunity to negotiate with SSgA over fees. I advised Marvin Tong to discuss HFS' advice with SCE's Benefits Accounting staff. My understanding is that Benefits Accounting negotiated with SSgA, which, later in 2005, dropped its fees from 18 basis points to 12 basis points.

33. The Money Market's Fund's fees continued to decrease over time as assets in the Money Market Fund have increased, and after discussions between Edison and SSgA in 2007, the fees were reduced to the current rate of 8 basis points on October 1, 2007. I believe these fees are reasonable and similar to fees paid for other money market funds. Also, in April 2008, HFS notified Edison that an investment management fee of 8 basis points per year for the Money Market Fund was reasonable and competitive.

34. Due to my position with SCE, I am a custodian of the records attached to this Declaration. The records attached to this Declaration are kept by Edison in the regular course of their business. It was the regular course of that business for an employee or representative of the business with knowledge of the act, event, condition, opinion, policy, report, record, or data compilation (collectively, the "records") to make the records or to transmit information thereof to be included in such records. The records were made at or near the time the act, event, condition, opinion, policy, report, records, or data compilation occurred or reasonably soon thereafter. The records attached hereto are the originals or exact duplicates of the originals.

35. The records attached hereto are as follows:

a. Trial Exhibit No. 52 – SCE-E00151310-12
b. Trial Exhibit No. 55 – SCE-U006145-47
c. Trial Exhibit No. 78 – SCE-E00151483-85
d. Trial Exhibit No. 162 – SCE-E00191557-60
e. Trial Exhibit No. 249 – SCE006386-431
f. Trial Exhibit No. 277 – SCE-U006462-63
g. Trial Exhibit No. 1004 – SCE111057-59
h. Trial Exhibit No. 1589.13 – SCE113973
i. Trial Exhibit No. 1589.19 – SCE103982-83

I declare under penalty of perjury under the laws of the United States of America and pursuant to 28 U.S.C. § 1746 that the foregoing is true and correct and that this Declaration is executed this 2nd day of October, 2009 in Rosemead, California.

/s/ DAVID E. ERTEL
David E. Ertel

Exhibit No. 277

MINUTES
TRUST INVESTMENT COMMITTEE / CHAIRMAN'S SUBCOMMITTEE MEETING
June 30, 2003

TIC Committee members: Ted Craver, Chairman; Bry Danner; Fred Grigsby; Kevin Smith; Deborah Ranier; Tom Noonan

Subcommittee members: Tom Noonan, Chairman; Ted Craver; Kevin Smith; Bob Boada and Mary Simpson

Others Present: Dave Ertel; Greg Henry; Mary Stoddard; Marvin Tong; Lori Meaders; Greg Nordquist and Michael Hall from Frank Russell Consulting

Pension Fund International Equity Manager Recommendation (see attached presentation) – Greg Henry presented to the Trust Investment Chairman's Subcommittee the results of an international growth equity manager search that was conducted by the Investment staff. This study was done to address a structural gap in the Plan's international equities' asset allocation which has resulted in a value bias, and to reduce the under-weight in international equities physical securities. The under-weight (approximately 3%) resulted from the reduction of the Driehaus account and the termination of the Progress Non-US account earlier in 2003. Greg discussed the process that was applied in selecting the new manager; the results of the top three candidates; and the staff's recommendation to hire Oechsle International Advisors as a new international equity manager. It was highlighted that Oechsle's

style of investing was most compatible and complementary to our existing international equity manager line-up. After asking some clarifying questions about Oechsle's investment style, the recent rank change by Russell Consulting from a "hire" to a "retain," and slides 8 and 9, the Committee unanimously approved the hiring of Oechsle International Advisors.

401-K Mutual Fund Menu Recommendation (see attached presentation) – Marvin Tong and Dave Ertel presented a proposal to replace eight of the funds in the Mutual Fund Window that are either under-performing or have significant organizational issues and portfolio manager turnover. As directed by the Trust Investment Chairman's Subcommittee in January 2002, staff is reviewing the 401-K options on an annual basis. (Tom Noonan expressed concern about the frequency of fund changes, and Dave Ertel responded that changes are only made if significant issues arise.) They discussed the evaluation criteria utilized in replacing a fund in the plan, the search process and the watch list that is utilized in monitoring the various funds in the plan. The Committee approved the replacement of six funds that have been on the high priority watch list (Morgan Stanley Institutional Equity Growth, Morgan Stanley Institutional Value, T. Rowe Price Value, Baron Asset, Putnam Capital Appreciation, and Fidelity Utilities) with better performing/more stable funds with very similar investment style characteristics. They also agreed that mapping employees' funds directly to the replacement funds was most beneficial to our employees. They reiterated that good communication about these changes to the participants is critical. The Committee also approved the termination of the T. Rowe Price Science and Technology Fund (the fund that has been frozen since 2002). The

replacement fund (Pimco RCM Global Technology) has been in the plan for a year. The funds in the T. Rowe Price Science and Technology Fund will be mapped directly to the Pimco RCM fund, and employees will be advised of this change in advance. Staff also recommended that Janus Worldwide (Global) be terminated from the plan because of significant management change at this fund (Helen Young Hayes, the person responsible for much of the fund's past success, has retired), and that employees be given the option to create their own global allocation by investing in the wide variety of existing fund offerings. The Committee felt we should offer a comparable fund with a "global" mandate or leave it in until we could determine a suitable replacement. Lori Meaders did state that we could hold off in replacing this fund with a suitable replacement unless staff feels the management changes at this fund are so significant that immediate action was warranted.

Pension Fund Asset Allocation Study (see attached presentation): Greg Nordquist and Michael Hall met with the members of the Trust Investment Committee and the Chairman's Subcommittee to review the results of their Pension Fund Asset Allocation Study. They focused on the objective of the study and some specific scenarios to give the Committee a flavor of the requirements to meet our benefit obligations (page 25). They then reviewed the efficient portfolio mixes tested to portray the impact the policy allocation will have on the plan. Russell recommended that the Committee consider the possibility of increasing our allocation to alternative investments, including real estate and hedge funds, up to 15% of our equity allocation. Dave Ertel presented the "Staff Recommendation"

(attached). After much discussion, the Committee decided to maintain the policy allocation at 74% equity, 26% fixed income.

Case for International Equities (see attached presentation): There was a brief discussion about having an allocation to international equities in our plan. Michael Hall and Greg Nordquist discussed that the international markets can be expected to provide returns commensurate with the U.S. markets and provide diversification. Mary Simpson noted that we are one of the plans in the Russell Consulting Client universe which has the highest allocation to international equities. The Committee decided we should maintain our 25% allocation to international equities.

/s/ DAVID E. ERTEL

David E. Ertel
Manager of Investments

Reviewed and Approved:

/s/ LORI A. MEADERS

Lori Meaders, Legal Counsel

[Attorney Names & Addresses Omitted]

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Case No. CV 07-5359 SVW (AGRx)

GLENN TIBBLE, ET AL.,
Plaintiffs,

v.

EDISON INTERNATIONAL, ET AL.,
Defendants.

TRIAL DECLARATION OF EXPERT WITNESS JOHN W. PEAVY III

[Filed Oct. 5, 2009]

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* * *

Exhibit A

Glenn Tibble et al. v. Edison International et al.

Amended Expert Report of John W. Peavy III

* * *

IV. Basis for Opinions

* * *

I. Edison had and still has appropriate review procedures in place for monitoring its investment options.

69. As mentioned above, the investment staff was responsible for monitoring the performance of investment options. The investment staff regularly monitored the investment options' performance by comparing their risk/return characteristics against their benchmarks, and by monitoring for significant personnel, investment process, and organizational changes. As David Ertel testified,

> Usually the format that we go through, there is some summary information at the start and we review, you know, all of the funds in the line up. We take a look at what the assets are, what the fees are relative to the category average, the – what the participant allocations are, how they fit – those funds are fitting within style boxes, and – and then go over generally performance and comments across the board. And then the primary focus after that is more specific detail on the funds that we have on our

watch list, and we review those in greater detail.[121]

70. The investment staff periodically presented the performance of the investment options to Sub-TIC during the Sub-TIC meetings. The Sub-TIC met every quarter or nearly every quarter and sometimes even more frequently depending on the issues.[122]

71. There were two types of presentations during these meetings. The Trust Fund Briefing presentations summarized the performance and the asset allocation of the Plan.[123] The 401(k) Plan Mutual Fund Menu presentations focused on the investment options under the mutual fund tier and included an explanation for why any of the funds had been placed on a watch list or were recommended for termination. The investment staff presented their fund recommendations based on the fund evaluation criteria. The presentations included the implementation process for replacing the terminated funds or the funds on the watch list.[124]

72. While conducting the monitoring process, the investment staff worked with Hewitt to research possible alternatives and conduct fund searches to replace the terminated funds or the funds on

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[121] Deposition of David Ertel, March 19, 2009, 109:4-15.

[122] Deposition of David E. Ertel, March 19, 2009, 44:24-25.

[123] Third Quarter 2001, Trust Fund Briefing Trust Investment Chairman's Subcommittee December 5, 2001 (SCE2-E00131931-56).

[124] 401-K Plan Mutual Fund Menu Trust Investment Chairman's Subcommittee Meeting January 28, 2002 (SCE099907-14 at SCE099914).

the watch list.[125] Hewitt's role in the monitoring process was described in the deposition testimony of David Ertel:

> Q: How often would you say you interact with the investment consultants from Hewitt?
>
> A: I would say I interact with them on a formal basis on a quarterly basis when we do a review of all of the funds in the 401(k) line up. So on a formal basis, quarterly. We have a more extensive annual review as one of those quarterly filings. And then as needed, as issues come up or we have questions during the quarter
>
> Q: [A]re all of the options in the 401(k) plan discussed with Hewitt in those quarterly meetings?
>
> A: Yeah. Usually the format that we go through, there is some summary information at the start and we review, you know, all of the funds in the line up. We take a look at what the assets are, what the fees are that relative to the category average, the – what the participant allocations are, how they fit – those funds are fitting within style boxes, and – then go over generally performance and comments across the board. And then the primary focus after

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[125] 401(k) Fund Recommendation and Performance Trust Investment Committee/Chairman's Subcommittee June 4, 2008 Meeting (SCE-E00191736-50).

> that is more specific detail on the funds that we have on our watch list, and we review those in greater detail. I did also want to say that – Hewitt also sends monthly performance to us to show performance of the funds versus benchmarks and also against peer groups as well.[126]

73. In addition, the investment staff received informal advice from Frank Russell Associates, the Company's Pension Plan consultant, when necessary.

74. In addition to performance, conflicts between the policies of the funds and Edison's policies or any wrongdoing at funds resulted in termination of various funds. For example, during the November 8, 2004 Sub-TIC meeting, the Committee discussed the conflict between Fidelity's redemption fee policy and the policies of the Plan's other mutual funds. The investment staff recommended that the Fidelity funds in the Plan be replaced with other mutual funds. The Committee unanimously approved this recommendation.[127] In addition, during the December 12, 2003 meeting the Sub-TIC was briefed on the mutual fund industry investigations that were being conducted on one of the Putnam funds included in the Plan's mutual fund tier. The investment staff mentioned that there was no immediate concern, but

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[126] Deposition of David E. Ertel, March 19, 2009, 37:3-11, 109:1-21.

[127] Minutes Trust Investment Chairman's Subcommittee Meeting November 8, 2004 (SCE2-E00056785-7 at SCE2-E00056785).

they will continue to closely monitor developments.[128]

75. In short, Edison had and still has well-defined procedures for monitoring the investment options in the Plan and followed these procedures appropriately.

* * *

[128] Minutes Trust Investment Chairman's Subcommittee Meeting December 12, 2003 (SCE-U006291-2).

[Attorney Names & Addresses Omitted]

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Case No. CV 07-5359 SVW (AGRx)

GLENN TIBBLE, ET AL.,
Plaintiffs,

v.

EDISON INTERNATIONAL, ET AL.,
Defendants.

DIRECT TESTIMONY OF MARVIN TONG

[Filed Oct. 5, 2009]

I, Marvin Tong, being duly sworn on my oath, declare and state:

1. In this Declaration, I set forth my personal knowledge or my opinions based on my knowledge and experience.

2. I have worked as an Investment Analyst in the Investments Division of the Treasurer's Department at Southern California Edison ("SCE") since January 2003. In this capacity I am a member of SCE's Investments Staff. Edison International is the parent company of SCE (collectively, "Edison").

3. I report to David Ertel, SCE's Director of Investments. Mr. Ertel reports to Robert Boada, SCE's Vice President and Treasurer. My responsibilities as an Investment Analyst include monitoring

the investment options in the Edison 401(k) Savings Plan (the "Plan"). I spend approximately 50% of my time working on the Plan.

4. I have been a participant in the Plan since I began my employment with SCE in 2003.

5. Prior to my employment as SCE, I worked at Mercer Investment Consulting as a Senior Analyst for over 3 years. In that position, I worked on employee benefits issues, including consulting services for 401(k) plans. I earned a Bachelor of Science degree in Management Science from the University of California, San Diego. I have also earned the designations of Chartered Financial Analyst and Chartered Alternative Investment Analyst. These credentials attest to my knowledge and experience in risk and portfolio management, market efficiency and performance measurement and quantitative investment methods.

The Plan's Investment Options

6. The Plan's investment structure is designed to offer participants a wide variety of investment options as a means of promoting participant choice and control over their investments. Those options include different types of investment vehicles, different risk profiles, actively and passively managed options, and a range of expense ratios. Specifically, the Plan offers three commingled pre-mixed portfolios with different risk profiles, a commingled bond fund and two commingled U.S. equity funds managed by Frank Russell Trust Company (collectively with its affiliates, "Russell"), commingled money market and S&P 500 index funds managed by other investment managers, a company stock fund, and a wide variety of mutual funds, including specialty funds (e.g., real estate and utility sector funds).

The Monitoring and Selection of the Plan's Investment Options

7. The Edison International Trust Investment Committee (the "TIC") and its Chairman's Subcommittee (the "Sub-TIC") (collectively, the "Investment Committees") monitor and select the Plan's investment options. As members of the Investments Staff, David Ertel, Greg Henry and I routinely attend the Investment Committees' meetings, which generally occur on a quarterly basis. Despite our attendance at the Investment Committees' meetings, we are not members of the Investment Committees.

8. At the Investment Committees' quarterly meetings, the Investments Staff reports on the Plan's overall performance. Also, as explain in more detail below, the Investments Staff, when advisable, makes recommendations to the Investment Committees to terminate or add investment options and discusses funds on the Watch List for closer monitoring. Since 2003, I have assisted Mr. Ertel in preparing these presentations, and on occasion I have directly presented the information to the Investment Committees.

9. The investment criteria that have been approved by the Investment Committees for evaluating investment options for the Plan include the following: (1) the stability of the fund's overall organization; (2) the fund's investment process; (3) the fund's performance compared to benchmarks and peer groups; (4) the fund's total expense ratio; and (5) with respect to mutual funds, the availability of public information regarding the fund (collectively, the "Investment Criteria"). Under the Investment Criteria, the Investments Staff evaluates a fund's historical performance over a period of at least 3 years. If insufficient performance history is available for an investment

option, we will consider the lack of history as an important factor indicating that the fund may not be suitable for the Plan; since, without the performance history, there generally is limited information available regarding the fund, which is one of the Plan's Investment Criteria.

10. My understanding is that the five investment criteria listed above are the only criteria used by the Investments Staff. As is evident from that list, the availability of so-called "revenue sharing" or "12b-1" fees is not a criterion used by the Investments Staff or the Investment Committees in evaluating funds for inclusion in or removal from the Plan's line-up of investment options, and this has been the case at least since I started working for SCE in 2003.

11. Several steps are implemented before the Investments Staff recommends that an investment option be removed from the Plan. The Investments Staff receives performance reviews from Hewitt Financial Services ("HFS"), the Plan's investment consultant, which is an affiliate of the Plan's recordkeeper, Hewitt Associates LLC ("Hewitt"), regarding the Plan's investment options. These reviews are provided by HFS on a monthly, quarterly and annual basis. The information provided by HFS includes an investment option's risk, short-term, long-term and annualized performance, and deviation from benchmarks and peer groups.

12. In addition to the information we gather from HFS, the Investments Staff also meets with Russell on a quarterly basis to receive feedback regarding those investment options in the Plan's line-up that are managed by Russell. Russell manages these funds and provides consulting services for Edison's other benefit trusts. Even if Russell is not the investment manager for a particular mutual fund, to the

extent that Russell has performance or benchmarking data regarding the fund or fund manager, we will ask Russell for any relevant information it can provide.

13. The Investments Staff also uses sources such as Morningstar to conduct independent research regarding the Plan's investment options and to determine whether the investment options continue to meet the Investment Criteria. For example, the Investments Staff has access to a special database called the Morningstar Principia Pro, which provides in-depth data about mutual funds and other investment options.

14. As part of their research, the Investments Staff uses benchmarks when evaluating the performance of the Plan's investment options. The benchmark selected for each fund generally is an index similar to the fund's style, and we use the benchmark to compare the fund's risk and return. The Investments Staff's review of an investment option's performance in comparison to its benchmark is conducted on a net-of-fees basis.

15. If we determine that an investment option is not meeting one or more of the Investment Criteria, the Investments Staff places that fund on a Watch List for investment options that are in need of closer monitoring. The Watch List is presented to the Investment Committees to apprise members of funds that may later be recommended for removal from the Plan.

16. If the Investments Staff determines that an investment option included on the Watch List does not satisfy the Investment Criteria and is unlikely to improve, the Investments Staff will recommend to the Investment Committees that the investment

option be removed from the Plan's line-up. When making these recommendations to the Investment Committees, the Investments Staff presents the Investment Criteria and describes the shortcomings of the fund in question in light of the Investment Criteria.

17. When the Investments Staff recommends terminating an investment option, the Investments Staff has also traditionally recommended adding a replacement fund. The Investments Staff undertakes several steps prior to recommending a replacement fund.

18. First, the Investments Staff asks HFS to identify a small group of investment options that will serve as appropriate replacements for the option being removed. At times, the Investments Staff guides HFS' search by describing the type of investment option being sought and by making recommendations as to which options HFS should research. HFS then identifies a small group of investment options that meet the Plan's needs and presents the characteristics of those investment options to the Investments Staff in a written report.

19. Then, Mr. Ertel, Greg Henry, and I meet with a representative of HFS to discuss HFS' findings presented in the written report. Mr. Henry is also a member of the Investments Staff, but he now works primarily on Edison's other benefit trusts. Mr. Henry was the primary Investments Staff employee working for Mr. Ertel with respect to the Plan before I joined SCE in 2003.

20. In addition, I conduct my own independent research regarding the investment options by analyzing information from Morningstar and Financial Engines. I also consult with Russell to obtain any

research it can provide about the investment option that we are considering recommending to the Investment Committees.

21. Finally, I review my findings with other members of the Investments Staff. Together, we determine which investment options best meet the Investment Criteria and should be recommended to the Investment Committees for inclusion in the Plan's investment option line-up.

22. After the Investments Staff determines which investment option should be recommended to the Investment Committees, I assist Mr. Ertel in preparing a presentation explaining our reasons for recommending a particular investment option. Our presentations outline the characteristics of the recommended fund and explain how the option complies with the Investment Criteria.

23. The Investment Committees' members discuss the Investments Staff recommendations at the Investment Committees' meetings. The members of the Investment Committees commonly raise questions about these recommendations. If the Investment Committees approve the recommended termination or addition, the Investments Staff works with Human Resources to implement the change. However, on more than one occasion, the Investment Committees have disagreed with our recommendation. Trial Exhibits Nos. 55, 277, 1004 are minutes from Investment Committees meetings during which members of the Investment Committees questioned our recommendations or chose not to adopt the recommendations of the Investments Staff to select or terminate a fund.

* * *

I declare under penalty of perjury under the laws of the United States of America and pursuant to 28 U.S.C. § 1746 that the foregoing is true and correct and that this Declaration is executed this 2nd day of October, 2009 in Rosemead, California.

/s/ MARVIN TONG

Marvin Tong

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Case No. CV 07-5359 SVW (AGRx)

GLENN TIBBLE, ET AL.,
Plaintiffs,

v.

EDISON INTERNATIONAL, ET AL.,
Defendants.

REPORTER'S TRANSCRIPT OF TRIAL PROCEEDINGS

TUESDAY, OCTOBER 20, 2009

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* * *

[Cross-Examination of David E. Ertel]

[32]

* * *

Q. Mr. Ertel, the court has identified a number of investment criteria that your staff was bound to follow.

You're familiar with those, correct?

A. Yes. Those are the criteria that we followed in our evaluation and recommendations to our committee.

Q. That set of criteria was passed down by the investment committees to your investment staff to follow, true?

A. Yes, I would say that.

Q. You understand that one of the investment criteria was total expense ratio?

A. Yes.

Q. Total expense ratio with respect to mutual funds is the fee that is charged by the mutual fund company that is paid by [33] the participants, true?

A. Yes.

Q. And is it your understanding that the investment committees expected the staff to make recommendations to the committees with respect to evaluation of mutual funds periodically, not just at the time that those funds were added to the plan?

A. I'm not sure I followed that.

Q. These investment criteria did not apply only at the time that investment funds were added to the plan. In fact, those criteria were expected to be applied periodically in your monitoring of these plan investments, correct?

A. Yes, that's correct.

* * *

[35]

* * *

Q. Did you recognize, sir, that there was an obligation to the committee to periodically review the expense ratio of the funds that were in the plan?

A. As in the reviews that we conducted, what we looked at was the – whether a fund was meeting all of the criteria, including the fund organization; were there any issues there that needed to be addressed; the investment process being followed by the fund; performance versus peers and benchmarks; and that

is net of the performance. It would directly be affected by the level of expense ratio. Was it performing well relative to peers and benchmarks; was the expense ratio reasonable compared to an average for that type of fund; and then also for the mutual funds was the – was there publically available information for the plan participants to be able to do their own research to make their own decisions about whether they wanted to invest in that fund or not.

* * *

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Case No. CV 07-5359 SVW (AGRx)

GLENN TIBBLE, ET AL.,
Plaintiffs,

v.

EDISON INTERNATIONAL, ET AL.,
Defendants.

REPORTER'S TRANSCRIPT OF TRIAL PROCEEDINGS

WEDNESDAY, OCTOBER 21, 2009

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* * *

[Cross-Examination of Steve Pomerantz]

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[8]

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THE COURT: Let me get to that. Just let me understand one more thing about your basic approach before you get to that.

So if, for example, at the time a particular mutual fund came into the mix of assets of the plan and the plan purchased retail class shares, you would say, all things being equal, and the institutional shares being lower, they breached their fiduciary duty by not lowering the cost to the plan participants?

THE WITNESS: Yes.

THE COURT: And so then – of course that view would remain until and if the institutional shares were exchanged for – I mean the retail shares were exchanged for retail [sic] [9] shares, and that's how you did your calculation –

THE WITNESS: To institutional. I understood what you meant, yes.

THE COURT: Now turn on the name change situation, and the argument – and I've heard this several times in the last couple of days – it's not registering with me, but maybe after I hear you, it will help – the argument seems to be that because the – with regard to the Franklin, Janus and Allianz CCM Capital funds, that those funds were already in the plan and that all that occurred was a name change so that they're – the defendant contends that under your theory of the case, there was no requirement to change to an institutional class because these were not new funds in the plan?

MR. ECCLES: That's right –

THE COURT: And were these funds in the plan prior to August 2001?

MR. ECCLES: The testimony, I believe, from Mr. Ertel and all the documents, these are in the original lineup, all three of them, from 1999.

THE COURT: Understanding that's the defense position, can you now tell me how you deal with that position and why you think it's not a valid point insofar as your general thesis is concerned that all things being equal, a plan should buy the class share with the lower fee. In most instances, the institutional share, forgetting eligibility and [10] everything else. Go ahead.

THE WITNESS: I understand your question, and let me try to respond.

I don't think it's fair to characterize this as just a name change. In all due respect to the court, it's one thing for me to change my name from Stephen to Robert, it's another thing to change my name from Stephen to Roberta; and that's really what we're talking about here. I mean no disrespect, sir.

Let's look at Franklin as an example. This is a mutual fund that, yes, was in the plan earlier. It was a small-cap fund. It had a particular mandate. It invested in certain types of stocks. At a certain point in time, it was a decision by Franklin to basically recast that fund with a different name because the mandate of that fund changed.

THE COURT: From –

THE WITNESS: From a small-cap mandate to basically a small mid-cap mandate and in fact Edison in their representation of this particular option to participants, reclassified it as a mid-cap fund, as opposed to a small-cap fund.

A simple name change would not require a reclassification by Edison in its representation, nor would it facilitate nor would it require even a change on the part – I'm sorry – Franklin's name change is not really a marketing [11] stunt, it's actually a name change because the underlying process of the mutual fund changes. It becomes a different product. It may be the same legal vehicle. The assets indeed transfer dollar for dollar. There was no mapping, there was no conscious intention for moving the assets from one fund to another, but the underlying fundamental process of the fund actually changed as a result and therefore –

THE COURT: Let me interrupt. I follow that. Before you get more into that – and I'm not going to cut you off, but a thought occurs to me: Why is it relevant as to whether the – it was a name change or the fund remained the same? Isn't it part of your thesis that even if a mutual fund was in the plan prior to August of 2001 and the fund had purchased the retail shares and the retail shares, class shares, were more expensive fee wise than the institutional share class, all things being equal, that within the statutory period, that is August 2001, forward, that the plan was obligated to exchange that for the institutional share, or is your testimony limited to when a fund first came into the plan?

THE WITNESS: Well, I think that in the case of these three funds that counsel is discussing, I believe that the events that I address are significant enough that they should have triggered a due diligence process.

THE COURT: But not so with regard to a plan – a fund that came into the plan pre-August 2001 that didn't have [12] some structural change as is the case – or mission change with the three funds that we're talking about here. There you are not saying that due diligence would have required the plan to transfer from retail to institutional.

THE WITNESS: I guess what I'm saying –

THE COURT: I want to get the clarification.

THE WITNESS: Yeah. For these three funds, I believe that the events that are identified should have triggered a due diligence process and that the result of that due diligence process would have identified – should have identified that there was an

alternate share class that the plan should have been invested in.

THE COURT: Let me put it a different way: Let's say that these plans didn't have a name change, that they existed as they were initially put into the plan, and because of the statute of limitations, there couldn't be any damage except for August of 2001. Would you contend that if these plans – that the three in question before their name changes and/or structural change were in the plan, that during the relevant time period due diligence would have required the plan to nevertheless buy an institutional share class, all things being equal, assuming the institutional share class had a lower fee?

THE WITNESS: Well, in a perfect world, independent of when they purchased – when the option initially went into the plan, I would think that some due diligence process should [13] be undergone with some frequency. Could be quarterly, could be annually –

THE COURT: That isn't really the thrust of your testimony, right?

THE WITNESS: It is a part because I believe that with respect to these three funds, even though they were in the plan prior to the time period that you identified, I believe that what occurred in these funds was significant enough that it should have triggered the committees to deal with them as if they were new funds because, in fact, they were. They weren't legally new entities, they weren't new – well, in two cases they were – but it wasn't because the legal entity changed, but because there were significant enough changes in the funds that the due diligence process should have been triggered and it should

have at that point identified, amongst other things, the share class issue.

THE COURT: And you told us what the structural change was with Franklin and – can you briefly tell me what the changes were beyond name change with Janus and Allianz CCM.

THE WITNESS: Ownership is – it can be fatal. Ownership is a very, very significant feature of a fund.

THE COURT: With Franklin, there wasn't a change in ownership, it was just the nature of the mission of the fund, but with Janus and Allianz it was a change in ownership.

THE WITNESS: Yes.

* * *

[Cross-Examination of John Peavy III]

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[47]

* * *

Q. Let's go through these quickly: Availability of information to participants; a stable, talented management team; consistent investment process; appropriate risk controls; good performance; and competitive fees.

Now, do you agree that among share classes of a mutual fund, that oftentimes institutional share classes are less expensive?

A. I agree that often the institutional classes will have lower fees, if that is what you mean by less expensive.

Q. Do you agree that fiduciaries should be evaluating the relative fees that are available from institutional share classes when they are reviewing the funds that they have in the plan?

A. In my opinion and the way I do it is I look at total fees when I'm evaluating any investment. Just like the testimony from Mr. Ertel, Mr. Tong, from Ms. Hess, I look at total fees, and the key is the term – the amount that you hope to achieve is a net rate of return. I don't look at every key component of fees. Fees are one component I look at, but I look at total fees and total net returns after fees.

Q. That is the same thing that Edison's identified here, correct?

A. Well, that is among the things they've identified. They [48] look at good performance, which I assume because I know they said they did; they look at net performance after the deduction of fees; and they look at competitive fees.

* * *

[Attorney Names & Addresses Omitted]

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Case No. CV 07-5359 SVW (AGRx)

GLENN TIBBLE, ET AL.,
Plaintiffs,

v.

EDISON INTERNATIONAL, ET AL.,
Defendants.

SUPPLEMENTAL DECLARATION OF DAVID E. ERTEL IN SUPPORT OF DEFENDANTS' SUPPLEMENTAL BRIEF PURSUANT TO THE COURT'S OCTOBER 26, 2009 ORDER

[Filed Nov. 19, 2009]

I, David E. Ertel, being duly sworn on my oath, declare and state:

1. In this declaration, I set forth my personal knowledge or my opinions based on my knowledge and experience.

2. I have been employed as the Director of Investments at Southern California Edison Company ("SCE") since March 2008. Edison International is the parent company of SCE (collectively, "Edison"). Prior to my current position, I was the Manager of Investments from 1995 to March 2008. These posi-

tions are within SCE's Investments Division of the Treasurer's Department.

3. In total, I have 22 years of investment experience at SCE. I received my Bachelor's degree in Economics and Master's degree in Business Administration from California State University, Los Angeles.

4. As Director of Investments, I am a member of and supervise SCE's Investments Staff, which includes Marvin Tong, Greg Henry, Linda Macias and Darleen Loose. The Investments Staff is responsible for monitoring and evaluating the investments for the Edison 401(k) Savings Plan ("the Plan"), which was formerly known as the SCE Stock Savings Plus Plan, as well as the investments for other trusts sponsored by Edison. In evaluating mutual funds for inclusion in the Plan line-up, the Investments Staff generally relied on Hewitt Financial Services ("HFS") to provide advice on selecting available share class options prior to Marvin Tong joining the Investments Staff in January 2003.

5. I have been asked to describe the Investments Staff's analysis of the Franklin Small Cap Growth Fund being renamed the Franklin Small-Mid Cap Growth Fund effective September 1, 2001.

6. The Franklin Small Cap Growth Fund – Class I was one of approximately 40 mutual funds added to the Plan in early 1999. Franklin also offered at that time an Advisor share class for the Small Cap Growth Fund with a lower expense ratio than the Class I share class, but the Advisor share class had an inception date of January 2, 1997 and did not have a Morningstar rating, in contrast to the I share class which had an inception date of February 14, 1992 and did have a Morningstar rating.

7. Effective September 1, 2001, the Franklin Small Cap Growth Fund was renamed the Franklin Small-Mid Cap Growth Fund. It retained its investment managers and organization, but expanded its main investment strategy to invest at least 80% of its net assets in the equity securities of small capitalization and mid capitalization companies, as is reflected in the fund's prospectus (excerpt attached as Ex. 7 to the Post-Trial Declaration of John Peavy, III, filed concurrently herewith). The Investments Staff reviewed the fund and concluded that it still satisfied the investment criteria for the Plan, but that it should be reclassified as a mid-cap growth fund for the Plan's purposes. Accordingly, at the January 28, 2002 meeting of the Trust Investment Committee's Chairman's Subcommittee ("Investment Committee"), the Investments Staff recommended reclassifying the fund as a mid-cap growth fund and adding a new small-cap growth fund (the William Blair Small Cap Growth Fund). The Investments Staff did not recommend adding the Franklin Small-Mid Cap Growth Fund to the Watch List, since it continued to satisfy the investment criteria for the Plan. The Investment Committee approved the recommendation.

8. The name change of the Franklin fund and the related expansion of its investment strategy to also include mid capitalization companies was not equivalent to adding a "new" fund to the Plan. It was a reclassification of the fund from one category (small capitalization growth) to another category (mid capitalization growth). The Investments Staff's assessment was that Franklin could successfully apply its investment decision process to small and mid capitalization stocks, as it had to small capitalization stocks previously. Therefore, the change did not require the type of in-depth review the Investments Staff under-

takes when recommending a new fund because it continued to meet the investment criteria.

9. The following are the approximate dates between August 2001 and the end of 2005 on which changes to the Plan's investment lineup occurred: July 2002, October 2003, December 2003, October 2004, January 2005, and October 2005.

I declare under penalty of perjury under the laws of the United States of America and pursuant to 28 U.S.C. § 1746 that the foregoing is true and correct and that this Declaration is executed this 19th day of November, 2009 in Rosemead, California.

/s/ DAVID E. ERTEL
David E. Ertel

[Attorney Names & Addresses Omitted]

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Case No. CV 07-5359 SVW (AGRx)

GLENN TIBBLE, ET AL.,
Plaintiffs,
v.

EDISON INTERNATIONAL, ET AL.,
Defendants.

DECLARATION OF EXPERT WITNESS DANIEL J. ESCH

[Filed Nov. 19, 2009]

I, Daniel J. Esch, being duly sworn on my oath, declare and state:

1. I am more than 18 years of age and am capable of making this declaration.

2. In this declaration, I set forth my personal knowledge or my opinions based on my knowledge and experience. If called to testify to the facts stated herein, I could and would do so competently.

QUALIFICATIONS

3. I have more than 25 years of experience in the retirement and investment business. I am the Chief Executive Officer and Managing Director of Defined Contribution Advisors, Inc. and have served in that capacity since 1994. My firm is a federally registered

investment adviser and provides consulting and investment advisory services to corporations and plan fiduciary committees on matters of plan design, as well as matters of investment selection, investment monitoring, recordkeeping, and administration associated with their retirement plans.

4. For the past 20 years, I have provided consulting services on a fee for service basis to more than 300 major corporations. I have worked with approximately 20 different defined contribution plans that each had assets in excess of $1 billion. My average defined contribution plan client has approximately $165 million under management. Services provided to these plans have included investment selection recommendations, ongoing monitoring, plan design, and Employee Retirement Income Security Act ("ERISA") consulting.

5. Before I joined Defined Contribution Advisors, I was an officer for several large financial services companies, leading their efforts to establish their retirement plan service businesses. I worked for The Wyatt Company (now Watson Wyatt Worldwide) and served on the Board of Directors for Wyatt Asset Services, Inc., which was the investment advisory entity of The Wyatt Company. I was a Vice President of Wyatt Asset Services, Inc., and a member of Wyatt's National Defined Contribution Practice Committee and Wyatt's Defined Contribution Strategic Planning Committee. In addition, I worked on strategic corporate initiatives, including benefit outsourcing and administration developments for the Board of Directors.

6. My retirement consulting clients have included such companies as Honeywell, TRW, BP America, RJR Nabisco, Archer Daniels Midland, The Toro Company, Houston Industries, Northern States

Power Company, Pillsbury, Freeport-McMoRan and Pella Corporation. I have provided consulting services to a number of large financial institutions, including American Express, TIAA-CREF, Prudential and New York Life. I have consulted on projects for industry investment data providers Morningstar and Lipper. Working through investment bankers, I have served as strategic advisor on numerous merger and acquisition transactions involving retirement servicing businesses. I currently serve as a fiduciary on many retainer client investment committees and advise their Boards of Directors as to retirement plan and investment matters.

7. My background is described more fully in my curriculum vitae, which is attached as Exhibit A. I have not provided expert deposition or trial testimony within the last four years. The documents and other information that I considered in forming my opinions and preparing this declaration are identified in Exhibit B and/or in the text of or attachments to this declaration. I am being compensated at $450 per hour.

ASSIGNMENT AND SUMMARY OF OPINIONS

8. I have been retained by counsel for Defendants to provide expert testimony relating to six mutual funds that have been investment options in the Edison 401(k) Savings Plan ("Plan" or "Edison Plan") –MFS Total Return Fund, William Blair Small Cap Growth Fund, PIMCO (Allianz) RCM Global Tech, Franklin Small (Small-Mid) Cap Growth Fund, Janus (Berger) Small Cap Value Fund, and PIMCO CCM Capital Appreciation Fund. I understand that Plaintiffs' expert, Steven Pomerantz, asserts that fiduciaries to the Plan breached their fiduciary duties by not selling retail class shares in these six funds and purchasing in their place institutional class

shares of the same funds as soon as the Plan became eligible to do so, and that the Plan suffered damages resulting from the difference in investment management fees charged by the retail class shares and those that would have been charged by the institutional class shares if the Plan had been invested in those shares. (Pomerantz Trial Decl. ¶ 13.)

9. I have been asked to offer expert testimony as to whether it was appropriate for fiduciaries to the Plan not to have automatically converted the shares in these six funds from retail to institutional class the moment it became possible to do so.

10. Based on my review of the materials and my knowledge and experience in the retirement and investment businesses, I conclude that it was appropriate for the fiduciaries not to have made these conversions. This opinion has three main parts:

(a) **Conversions.** In my experience, large pension plan fiduciaries do not automatically change the share classes of mutual funds in which the plans are invested as soon as the assets in a given fund meet the minimum investment requirement for institutional shares of the same fund. A reasonable approach, and one that I understand the Plan's fiduciaries took here, is not to make changes to the lineup unless a significant issue with respect to the investment criteria arises, and to make any resulting changes periodically. By contrast, making numerous plan lineup changes in real time can cause participant confusion, and can cause disruptions to plan administration.

(b) **Name changes:** Janus (Berger) Small Cap Value Fund and PIMCO (Allianz) CCM Capital Appreciation Fund changed their names to reflect reorganizations or purchases of their parent com-

panies. The funds' management and investment strategy did not change in connection with the renaming. Thus, these name changes would not have triggered a quick review rather than an in-depth due diligence process on the part of the Plan's fiduciaries that would yield an analysis of the share class in which to invest. The change of Franklin Small Cap Growth Fund to the Franklin Small-Mid Cap Growth Fund also would have triggered a quick review. The style of that fund had been changing from a small cap to a small-mid cap, and those changes had been disclosed to investors. Thus, the eventual name change reflected an underlying style change that had been occurring for some time.

(c) **Investment minimums:** I understand that in support of plaintiffs' assertion that the Plan should have requested, and would have obtained, waivers of institutional mutual fund shares' minimum investment requirements, Mr. Pomerantz testified at trial that "Billion dollar clients get whatever they want. It is just that simple." In my experience, it is not that simple, and it is speculative for plaintiffs to suggest that the fund managers would have waived the minimums here.

(d) **Reliance on investment consultants:** It was appropriate for the Plan's fiduciaries to rely on their investment consultants for advice on the question of which available mutual fund share classes should be selected for the Plan.

BASES FOR OPINIONS

I. LARGE PLAN FIDUCIARIES DO NOT AUTOMATICALLY AND INSTANTLY CONVERT MUTUAL FUND SHARE CLASSES WHEN THEIR PLAN MEETS INVESTMENT MINIMUMS

11. I understand that Plaintiffs assert that it was imprudent for the Plan's fiduciaries not to monitor continuously whether the Plan's holdings in retail mutual fund shares were large enough to meet minimum requirements for institutional shares in the same fund, and then immediately convert to institutional shares upon meeting that minimum. I disagree with Plaintiffs' assertion. Based on my experience, similarly situated fiduciaries do not automatically change share classes when funds cross the threshold for an institutional share class.

12. First, I am not aware of any regular practice among large plan fiduciaries to continuously search out the cheapest share class of all existing mutual funds in its lineup, and immediately convert to that class as soon as its investment minimum is met.

13. Based on my experience and survey data that I have reviewed, many large plans have substantial holdings in retail mutual funds. For example, a survey of large 401(k) plans, Exhibit C, shows that as of 2007, 60% of plans containing between $1 and $5 billion of assets, like Edison's, invested in retail classes of funds and seventy-nine percent invested in institutional classes.[1] Furthermore, according to the Investment Company Institute, Exhibit D, in 2001, 44% of mutual fund assets in 401(k) plans were invested in no-load retail share classes; only 20%

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[1] See 2007 Greenwich Associates Survey: "Corporate Defined Contribution Plans."

were invested in no-load "institutional" shares, and 3% were invested in no-load "retirement shares."[2] Many fund complexes through the period of 2001 to the present offered both retail and institutional share classes to investors.

14. A reasonable approach, and one that I understand the Plan's fiduciaries took here, is not make changes to the lineup unless a significant issue with respect to the investment criteria arises, and to make changes periodically (generally no more than once a year), rather than continuously. It is my understanding that the Plan's investment criteria have included the following: (1) the stability of the fund's overall organization; (2) the fund's investment process; (3) the fund's performance compared to benchmarks and peer groups; (4) the fund's total expense ratio; and (5) with respect to mutual funds, the availability of public information regarding the fund (collectively, the "Investment Criteria"). It is also my understanding that the Plan's fiduciaries adhered to these criteria in periodically making changes to their investment lineup.

15. Second, there has been a proliferation of mutual fund share classes in recent years. A policy of automatically converting share classes could cause plan fiduciaries to be "chasing" share classes as funds introduce additional share classes.

16. Third, automatic and immediate share-class conversions can cause participant confusion and impose administrative burdens. I understand that, in light of these factors, the Edison Plan's fiduciaries

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[2] Investment Company Institute, Research Fundamentals, Vol. 18, No. 6, "The Economics of Providing 401(k) Plans: Services, Fees and Expenses," at 23 (Figure A2) (Aug. 2009) (available at http://www.ici.org/pdf/fm-v18n6.pdf).

changed investment options no more than once a year, with only a couple of exceptions.

17. In light of the foregoing, the Edison Plan fiduciaries' practice of periodically reviewing investment options against the Investment Criteria, and not automatically converting to an institutional share class when it became available, was appropriate.

II. CHANGES ASSOCIATED WITH THE JANUS (BERGER) SMALL CAP VALUE FUND, PIMCO (ALLIANZ) CCM CAPITAL APPRECIATION FUND, AND FRANKLIN SMALL (SMALL-MID) CAP GROWTH FUND WOULD NOT HAVE PROVOKED AN IN-DEPTH DILIGENCE PROCESS TO ANALYZE SHARE CLASSES

18. I understand that Plaintiffs assert that the Plan's continued investment in Franklin Small (Small-Mid) Cap Growth Fund, Janus (Berger) Small Cap Value Fund, and PIMCO (Allianz) CCM Capital Appreciation Fund was tantamount to a set of new decisions to invest in those funds, as a result of changes that supposedly occurred with respect to each of those funds. I disagree. The limited nature of the changes associated with these funds would not have triggered an in-depth due diligence process that would yield an analysis of share class.

19. The names of the Janus (Berger) Small Cap Value Fund and PIMCO (Allianz) CCM Capital Appreciation changed as a result of reorganization or ownership changes to their parent companies. These were name changes only. There were no associated changes in management, investment strategy, or any other material factor. Thus, there was no reason for the Plan's fiduciaries to analyze share classes in these funds as if continued investments in these

funds were tantamount to making new investments in them.

20. As for the Franklin Small (Small-Mid) Cap Growth Fund, Mr. Pomerantz asserts that "[i]n September of 2001, the fiduciaries added, and retained until September 2007, a retail share class 'A' of this fund, although an institutional class was available at that time, and has continued to remain available to date." (Pomerantz Trial Decl. ¶ 26.) The Plan's fiduciaries did not "add" shares in this fund in the sense of making a brand-new investment. Rather, the Plan had held shares of the Franklin Small Cap Growth Fund since 1999. In 2001, those shares were converted by Franklin into shares of Franklin Small-Mid Cap Growth Fund. The style of that fund had been changing from a small cap to a small-mid cap, and those changes had been communicated to investors in fact sheets and otherwise. Thus, the eventual name change reflected an underlying style change that had been occurring for some time.

21. Given the limited nature of these changes, it was appropriate for the Plan's fiduciaries not to have engaged in a due diligence process regarding the share classes for these three funds at the time of the changes.

III. FUND MANAGERS DO NOT AUTOMATICALLY WAIVE INSTITUTIONAL SHARE CLASS INVESTMENT MINIMUMS FOR LARGE PLANS

22. I understand that Mr. Pomerantz testified at trial that for plans with more than one billion dollars in assets, all mutual funds will automatically waive minimum investment requirements for their institutional shares. Based on my experience with a number of billion-dollar plans, this is not necessarily the

case, and hence it cannot be assumed that MFS Total Return Fund, William Blair Small Cap Growth Fund, and PIMCO (Allianz) RCM Global Tech Funds would have automatically waived their institutional share minimums for the Plan.

23. First, fund complexes vary in how they enforce the minimum investment requirements set forth in the prospectuses. PIMCO, for example, does not automatically waive minimums for large pension plans. Rather, PIMCO makes case-by-case waiver determinations that depend on a variety of factors. In a similar manner, MFS and William Blair look for a commitment by the plan that it will meet the minimum within a specified time frame, and have formal internal processes that depend on a variety of factors.

24. Second, a fund complex is more likely to consider waiving investment minimums for institutional shares where it expects a large influx of assets from the plan that is considering investing with the fund complex. Thus, the mere fact that a plan has assets of a billion dollars or more does not necessarily mean that a fund complex can reasonably expect a large influx of assets from the plan. Even with a large plan, large influxes to a fund complex are less likely where the plan's assets are highly segmented across different funds, as is the case with the Edison Plan, which I understand had approximately 40 mutual funds in it throughout the class period, including 38 mutual funds as of the end of 2005 and 41 mutual funds as of the end of 2003. (Doc. 319-2 (Final Pretrial Conference Order) at 6.) Furthermore, I understand that only approximately one-third of the Plan's assets are committed to mutual funds, and that the Plan generally offers at least two mutual funds in every style category. Taken together, these factors suggest that a fund complex would be less likely to expect a large influx of assets from a segmented plan

like Edison's than from a less segmented plan with far fewer investment options.

25. In light of the foregoing, it is not reasonable to assume that in all cases, "[b]illion dollar clients get whatever they want" with respect to waivers of minimum investment requirements for institutional class shares.

IV. IT WAS APPROPRIATE FOR PLAN FIDUCIARIES TO RELY ON INVESTMENT CONSULTANTS FOR ADVICE ON SHARE CLASS SELECTIONS

26. In my experience, plan fiduciaries often rely on their investment consultants for advice on the question of which mutual fund share classes to select, because such questions call for specialized expertise. This was especially true in 2001 and 2002, when plan fiduciaries did not have access to information about different share classes as commonly as they did in later years. I understand that here, the Plan fiduciaries relied on Hewitt Financial Services for investment consulting advice, including which available mutual fund share classes should be selected for the Plan. Under these circumstances, the Plan fiduciaries' reliance on HFS as to share class recommendations was appropriate.

I declare under penalty of perjury under the laws of the United States of America and pursuant to 28 U.S.C. § 1746 that the foregoing is true and correct and that this Declaration is executed this 19th day of November, 2009 in Minneapolis, Minnesota.

/s/ DANIEL J. ESCH
Daniel J. Esch

[Attorney Names & Addresses Omitted]

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Case No. CV 07-5359 SVW (AGRx)

GLENN TIBBLE, ET AL.,
Plaintiffs,

v.

EDISON INTERNATIONAL, ET AL.,
Defendants.

DECLARATION OF EXPERT WITNESS JOHN W. PEAVY III

[Filed Nov. 19, 2009]

I, John W. Peavy III, being duly sworn on my oath, declare and state:

1. I am more than 18 years of age and am capable of making this declaration.

2. In this declaration, I set forth my personal knowledge or my opinions based on my knowledge and experience. If called to testify to the facts stated herein, I could and would do so competently.

3. Exhibit 1 contains a list of the documents I considered in writing this declaration.

I. QUALIFICATIONS

4. I am Chief Executive Officer, Chief Investment Officer, and co-founder of Cimarron Asset Management, LLC, a Registered Investment Advisor that

manages approximately $700 million in equity securities. Since 1982, I have been Chairman and Chief Executive Officer of Peavy Financial Services, Inc., a Dallas-based financial consulting firm. I also am Professor of Professional Practices in Finance at the M. J. Neeley School of Business at Texas Christian University. I currently serve as a member of the Board of Trustees of the approximately $2 billion City of Dallas Employees' Retirement Fund.

5. From July 1999 to July 2002, I served as Chief Investment Officer of the Teacher Retirement System of Texas (the "TRST"). In that capacity, I was responsible for the investment of approximately $75 billion in retirement assets for more than one million plan participants (the seventh largest retirement plan in the United States ranked by assets and the second largest plan ranked by number of participants). Prior to my employment, I served for seven years as Investment Advisor to the TRST Board of Trustees.

6. I previously was Chairman and Chief Investment Officer of Founders Trust Company, a state-chartered trust company that I co-founded in 1992 and that was acquired by Wells Fargo Bank in 1998. In that capacity, I invested more than $500 million in client assets of which approximately one-half was in retirement plans. I have provided investment-related services for more than 35 years.

7. I was Professor of Finance and Chairman of the Department of Finance and held the M. J. Vaughn-Rauscher Chair in Financial Investments at the Edwin L. Cox School of Business at Southern Methodist University where I served on the faculty from 1979 to 1993. I also held the Arthur J. Morris Chair in Business Administration (visiting) at the Colgate Darden Graduate School of Business at the University of Virginia during 1994. I served on the

adjunct faculty at the Thunderbird School of Global Management (formerly the American Graduate School of International Management) where I taught executive education courses in finance from 1991 to 2001.

8. I received a Ph.D. in finance from the University of Texas at Arlington, an M.B.A. in finance from the Wharton School at the University of Pennsylvania, and a B.B.A. in banking and finance from Southern Methodist University. I am a Chartered Financial Analyst (CFA), a Chartered Financial Consultant (ChFC), and a Chartered Life Underwriter (CLU).

9. I am a member of the CFA Institute. I have served in many CFA-related capacities, including Chairman of the Candidate Curriculum Committee (prepares the entire curriculum for the CFA examination program), Chairman of the Portfolio Management Committee of the Council of Examiners (prepares all CFA examination questions pertaining to portfolio management), Executive Editor of The CFA Digest, Associate Editor of the Financial Analysts Journal, and Research Director of the CFA Research Foundation. I currently serve on the Strategic Advisory Board of the CFA Society of Dallas/Fort Worth.

10. I have taught courses in investments, financial instruments and markets, and corporate finance. I am the author or co-author of five books and over 50 articles published in academic and professional journals in the field of finance. I have been Associate Editor of the Journal of Investing since 1993. My curriculum vita is attached hereto as Exhibit 2. I have testified as an expert, either through deposition or in court, in more than 60 cases. A list of my expert witness experience for the last five years is attached hereto as Exhibit 3.

II. INTRODUCTION AND SCOPE OF ASSIGNMENT

11. I was asked by counsel for Edison International and Southern California Edison Company (collectively, "Edison" or the "Company") in connection with the matter *Glenn Tibble et al v. Edison International et al* to opine on several issues related to Edison's share class decisions for six mutual funds that the plaintiffs' expert Dr. Pomerantz identified in Exhibit C of his trial declaration.[1] The issues include availability of institutional share classes; eligibility requirements for institutional share classes; timing of the addition of the funds to the Plan; timing of name, ownership and investment statement changes; and whether these changes would automatically trigger a reconsideration of the funds' share class decisions. I have been also asked to analyze Dr. Pomerantz's calculations of alleged difference in mutual fund management fees for the six mutual funds.

III. SUMMARY OF OPINIONS

12. For the Janus Small Cap Value Fund, plaintiffs contend that when this fund "replaced the Berger Small Cap Value Investors fund, when Janus purchased Berger's business" in April 2003, the replacement resulted in an ownership change and "a potential shift in the investment strategy of the management of the fund."[2] Plaintiffs then argue that this fund should have been considered as a new invest-

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[1] *Glenn Tibble et al, Plaintiffs v. Edison International et al*, Defendants Declaration of Steven Pomerantz, Ph.D., October 5, 2009 ("Pomerantz Trial Declaration").

[2] Pomerantz Trial Declaration, ¶ 30; *Glenn Tibble et al, Plaintiffs v. Edison International et al*, Reporter's Transcript of Trial Proceedings ("Trial Transcripts"), October 21, 2009, Vol. 3, p. 16.

ment option in April 2003 and that Edison should have switched from retail to institutional shares.[3]

13. Contrary to the plaintiffs' claims, this fund had only a "cosmetic" name change in April 2003 related to reorganization of the Berger mutual fund family.[4] The ownership of the fund, its investment style, its management, and the benchmarks the fund used did not change after the name change. Given that the Berger Small Cap Value Fund was already in the Plan before 2001 and the change in April 2003 was merely a "cosmetic" change in the name of the fund, there was no need for the fiduciaries to reevaluate this investment option. Therefore, this fund should not be included in plaintiffs' alleged calculation of difference in fees.[5] However, if it were to be determined that the fund should have switched from retail to institutional shares in October 2003 when the Plan implemented fund changes, then the difference in fees would be $108,304 from October 2003 until August 31, 2007.[6] If one were also to account

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[3] Pomerantz Trial Declaration, ¶ 24.

[4] The reorganization was effective as of April 17, 2003 (See Janus Capital Group, "Janus Capital Announces First Quarter 2003 Results," press release, April 29, 2003).

[5] I understand that the funds that the analysis of difference in fees is limited between August 2001 and August 2007. *Glenn Tibble et al, Plaintiffs v. Edison International et al, Defendants*; Order Denying Plaintiffs Motion for Summary Judgment; Order Granting Defendants' Motion for Summary Judgment in Part [143] [145] [146] [147] [156] [186] [188], July 16, 2009, p. 14.

[6] It is my understanding that the Plan fiduciaries met on a quarterly basis and generally, would only make changes to the Plan's line-up once each year. Ertel Trial Declaration, ¶ 8; Tong Trial Declaration, ¶ 7; Tong Supp. Declaration, ¶ 12. Moreover, Hewitt Associates, the Plans' third-party administrator, requested that it be provided with 2-5 months to perform the testing and other tasks required for fund changes. Kobashigawa Supp.

for lost investment opportunity, the difference in fees would be $126,635 as of August 31, 2007, $91,567 as of December 31, 2008, or $125,401 as of November 17, 2009. (See Exhibit 4). I have picked these dates because August 2007 is when the complaint for this case was filed, December 31, 2008 represents the most recent full year for which data are available, and November 17, 2009 is the date with most recent data that I could use in my calculations.

14. For the PIMCO CCM Capital Appreciation Fund, plaintiffs contend that in April 2005 there was an ownership change and a potential shift in the investment strategy of the management of the fund.[7] Plaintiffs then argue that this fund should have been considered as a new investment option in April 2005 and that Edison should have switched from retail to institutional shares.[8]

15. Contrary to the plaintiffs' claims, this fund also had only a "cosmetic" name change in April 2005 related to the renaming of several PIMCO funds

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Declaration, ¶¶ 5-6; Tong Supp. Declaration, ¶ 14. During the relevant period, the Plan made fund changes in July 2002, October 2003, December 2003, October 2004, January 2005, and October 2005. Ertel Supp. Declaration, ¶ 9. For the purposes of my calculations, I use these dates as the dates that the Plan would have realistically changed the share classes for the six funds in question. For example, for the Janus (Berger) Small Cap Value Fund, I assume that the fund would have switched from retail to institutional shares in October 2003, which is the first date, after April 2003, that the Plan implemented fund changes. Exhibit 4 also presents alternative calculations, where I use the plaintiffs' assumption and assume that the share class changes would have been implemented immediately, without regard to the Plan's actual schedule of fund changes.

[7] Pomerantz Trial Declaration, ¶ 31; Trial Transcripts, October 21, 2009, Vol. 3, p. 15.

[8] Pomerantz Trial Declaration, ¶ 24.

(PIMCO was acquired by Allianz SE in 2000).[9] The ownership of the fund, its investment style, management, and the benchmarks the fund used did not change after the name change. Given that PIMCO CCM Capital Appreciation Fund was already in the Plan before 2001 and the change in April 2005 was merely a "cosmetic" change in the name of the fund, there was no need for the fiduciaries to reevaluate this investment option. Therefore, this fund should not be included in plaintiffs' calculation of difference in fees. However, if it were to be determined that the fund should have switched from retail to institutional shares in October 2005 when the Plan implemented fund changes, then the difference in fees would be $56,423 from October 2005 until August 2007. If one were also to account for lost investment opportunity, the difference in fees would be $59,709 as of August 31, 2007; $35,512 as of December 31, 2008; or $42,820 as of November 17, 2009. (See Exhibit 4).

16. For the Franklin Small-Mid Cap Growth Fund, plaintiffs claim that "[i]n September of 2001, the fiduciaries added, and retained until September 2007, a retail share class 'A' of this fund, although an institutional class was available at that time, and has continued to remain available to date."[10]

17. Although the plaintiffs claim that this fund was added to the Plan as of September 2001, the Franklin Small Cap Growth Fund had been in the Plan since 1999. In September 2001, there was a change in one of the investment criteria of the fund and the fund's name changed to reflect this update. The fiduciaries were aware of this change. In my

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[9] PIMCO history, http://www.pimco.com/LeftNav/AboutPIMCO/History.htm, retrieved on November 10, 2009.

[10] Pomerantz Trial Declaration, ¶¶ 24, 26.

opinion, this change should not be a reason for considering the fund as a new investment option especially when the ownership or the management of the fund did not change, and Morningstar did not consider this change to be significant enough to change their classification of the fund. Furthermore, in September 2001 there was no change to the existing share classes that the fund offered. Given that Franklin Small-Mid Cap Growth Fund was already in the Plan before 2001, this fund should not be included in plaintiffs' calculation of difference in fees. However, if it were to be determined that the fund should have switched from retail to institutional shares in July 2002 when the Plan implemented fund changes, then the difference in fees would be $129,544 from July 2002 until August 2007. If one were also to account for lost investment opportunity, the difference in fees would be $177,199 as of August 31, 2007, $111,322 as of December 31, 2008, or $158,856 as of November 17, 2009. (See Exhibit 4).

18. For the MFS Total Return Fund, plaintiffs argue that "[i]n July of 2002, the fiduciaries added, and retained until September of 2008, a retail share class "A" of this fund, although an institutional class (class "I") was available at that time, and has continued to remain available."[11]

19. While the class "I" shares were available back in July 2002, the Plan would not have necessarily been able to invest in class "I" shares at that time, as the fund imposed a minimum investment of $10 million to qualify for this class of shares, either alone or in combination with investments in class I shares of other MFS Funds.[12] In fact, Edison did not meet

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[11] Pomerantz Trial Declaration, ¶¶ 24, 27.

[12] MFS Series Trust Prospectus Filed on January 28, 2002.

the minimum investment requirement of the institutional share class until the second quarter of 2005.[13] Assuming that the Plan fiduciaries would have deemed a switch from class "A" to class "I" shares to be in the best interest of the Plan participants, and that the switch could have taken place in October 2005, the first date when the Plan implemented fund changes after meeting the minimum investment requirement, then the difference in fees would be $23,145 from October 2005 until August 2007. If one were also to account for lost investment opportunity, the difference in fees would be $23,952 as of August 31, 2007; $17,966 as of December 31, 2008; or $21,943 as of October 31, 2009.[14]

20. For the PIMCO RCM Global Technology Fund, plaintiffs argue that "[i]n July of 2002, the fiduciaries added, and retained until October of 2003, a retail ("A") share class of this fund, although an institutional ("I") class was available at that time, and has continued to remain available."[15]

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[13] Southern Cal Edison Working Trial Balance on March 31, 2005 (SCE 9436, p. 319); Southern Cal Edison Working Trial Balance on April 30, 2005 (SCE 9434, p. 317). I calculate average monthly asset balances and conclude whether the asset balance meets the minimum investment requirement based on this calculation. MFS Total Return Fund asset balances were $2,615,753 as of March 31, 2005, and $2,779,739 as of April 30, 2005. MFS International Equity Fund assets were $4,275,207 as of March 31, 2005, and $20,029,421 as of April 30, 2005. Thus, the first month in which Edison met the minimum institutional investment requirement was April 2005.

[14] I was provided return data until the end of October 2009 for the Russell Balanced Moderate Growth Portfolio. I use this fund's returns after October 2008 when the MFS Total Return Fund was terminated and the assets were mapped into the Russell Balanced Moderate Growth Portfolio.

[15] Pomerantz Trial Declaration, ¶¶ 24, 29.

21. While the class "I" shares were available back in July 2002, the Plan would not have necessarily been able to invest at that time in class "I" shares given that the fund imposed a minimum investment of $5 million to qualify for this class of shares.[16] In fact, Edison did not meet the minimum investment requirement of the institutional share class until the third quarter of 2003.[17] Assuming that the Plan fiduciaries would have deemed a switch from class "A" to class "I" shares to be in the best interest of the Plan participants, and that the switch could have occurred in October 2003, the first date when the Plan implemented fund changes after meeting the minimum investment requirement, then the difference in fees would be zero. This is because the fund qualified for class "I" shares in July 2003 and actually switched to class "I" shares in October 2003 when the Plan next made fund changes.

22. For the William Blair Small Cap Growth Fund, plaintiffs argue that "[i]n July of 2002, the fiduciaries added, and continue to retain, a retail share class "N" of this fund, although an institutional class (class "I") was available at that time, and has continued to remain available."[18]

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[16] PIMCO Funds: Multi-Manager Series Prospectus filed on December 28, 2001.

[17] Mutual Fund Menu per State Street as of May 31, 2003 (SCE 38245); Mutual Fund Menu per State Street as of June 30, 2003 (SCE 38233); Mutual Fund Menu per State Street as of July 31, 2003 (SCE 38155). I calculate average monthly asset balances and conclude whether the asset balance meets the minimum investment requirement based on this calculation. Asset balances were $3,798,528 as of May 31, 2003, $5,328,996 as of June 30, 2003, and $8,520,846 as of July 31, 2003. Thus, the first month in which Edison met the minimum institutional investment requirement was July 2003.

[18] Pomerantz Trial Declaration, ¶¶ 24, 28.

23. This fund's retail class was recommended by Hewitt Financial Services, which provides investment consulting services to the Plan. While the class "I" shares were available back in July 2002, the Plan would not have necessarily been able to invest at that time in class "I" shares given that the fund imposed a minimum investment of $0.5 million to qualify for this class of shares.[19] The Plan did not meet this requirement when the fund was added to the menu of investment options. Assuming that the Plan fiduciaries would have deemed a switch from class "N" to class "I" shares to be in the best interest of the Plan participants and that the switch could have occurred in October 2003, the first date when the Plan implemented fund changes after meeting the minimum investment requirement, then the difference in fees would be $180,309 from October 2003 until August 2007.[20] If one were also to account for lost investment opportunity, the difference in fees would be $200,876 as of August 31, 2007, or $102,781 as of December 31, 2008, or $172,260 as of November 17, 2009, if one were to account for lost investment opportunity. (See Exhibit 4).

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[19] William Blair Funds Prospectus filed on May 1, 2002.

[20] Southern Cal Edison Working Trial Balance on July 31, 2002 (SCE 9443, p. 310); Southern Cal Edison Working Trial Balance on August 31, 2002 (SCE 9442, p. 299). I calculate average monthly asset balances and conclude whether the asset balance meets the minimum investment requirement based on this calculation. Asset balances were $137,611 as of July 31, 2002 and $878,636 as of August 31, 2002. Thus, the first month in which Edison met the minimum institutional investment requirement was August 2002.

IV. BASIS FOR OPINIONS

A. Berger (Janus) Small Cap Value Fund:

24. The Berger Small Cap Value Fund had been in the Plan since March 1999. Effective April 2003, Stilwell Financial, which owned both the Janus and Berger families of mutual funds, reorganized several of Berger's funds into Janus.[21] As part of this reorganization, the name of Berger Small Cap Value Fund was changed to Janus Small Cap Value Fund, but the management, style, and the benchmark of the fund remained the same.

25. The prospectuses of the Berger (Janus) Small Cap Value Fund filed before and after the name change show that the management of the fund remained the same:

> Berger Prospectus filed on January 28, 2002:
>
> Robert H. Perkins of PWM has been the lead investment manager for the Berger Small Cap Fund since its inception in 1985. Thomas M. Perkins of PWM has also served as investment manager of the Berger Small Cap Value Fund since January 1999.
>
> Janus Prospectus filed on April 17, 2003:
>
> Robert H. Perkins of PWM is a Co-Manager of the Fund, and he managed the Fund's predecessor since its inception in 1985. Thomas M. Perkins of PWM is a Co-Manager of the Fund and he managed the Fund's predecessor since 1999.

26. Similarly, the prospectuses of the fund filed before and after the name change show that the investment style remained essentially the same:

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[21] Stilwell Financial, Form 10-K for the year ended December 31, 2001, p. 1; Berger Funds Form 497 filed on March 13, 2003.

Berger Prospectus filed on January 28, 2002:

> The Fund invests at least 65% of its assets in equity securities of small companies whose market capitalization, at the time of initial purchase, is less than the 12-month average of the maximum market capitalization for companies included in the Russell 2000 Index (Russell 2000).

Janus Prospectus filed on April 17, 2003:

> The Fund invests, under normal circumstances, at least 80% of its assets in equity securities of small companies whose market capitalization, at the time of initial purchase, is less than the 12-month average of the maximum market capitalization for companies included in the Russell 2000 Index.

27. In addition, the fund prospectuses filed before and after the name change show that the benchmark that the fund used (Russell 2000 Value Index) did not change.[22]

28. I analyzed Morningstar's evaluation of this fund around the time of the name change. Morningstar is a trusted source for information on stocks, mutual funds, variable annuities, closed-end funds, exchange-traded funds, separate accounts, hedge funds, and 529 college savings plans.[23] Morningstar did not change its categorization of this fund and the

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[22] Berger Omni Investment Trust Prospectus filed on January 28, 2002; Janus Investment Fund Prospectus filed on April 17, 2003.

[23] http://corporate.morningstar.com/US/asp/subject.aspx?xmlfile=177.xml, retrieved on November 11, 2009.

benchmarks it used for this fund as a result of the name change.[24]

29. Edison had a well-defined process to monitor the funds that were in the Plan. The monitoring involved whether the funds chosen continued to satisfy the following investment criteria: (i) stability of the fund's overall organization, (ii) the fund's investment process, (iii) the fund's performance compared to benchmarks and peer groups, (iv) the fund's total expense ratio, (v) the availability of public information with respect to the fund, (vi) the availability of ratings from Hewitt Financial Services, Morningstar and Frank Russell (when available).[25] A "cosmetic" name change would not raise any concerns with regard to any of these criteria and should not have triggered any additional review of the fund, including reconsideration of the Plan's share class decision.

30. I understand that funds which were already in the Plan prior to August 16, 2001, are excluded from the calculation of difference in fees.[26] Berger (Janus) Small Cap Value Fund has been in the Plan since 1999 and merely went through a "cosmetic" name change. The ownership of the fund, its investment style, management, and the benchmarks the fund used did not change after the name change. As

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[24] Retrieved from Morningstar as of March 31, 2002, and April 30, 2003.

[25] Ertel Trial Declaration, ¶ 9; Trust Investment Chairman's Subcommittee Meeting Presentation, January 28, 2002 (SCE09907-14 at 10).

[26] *Glenn Tibble et al, Plaintiffs v. Edison International et al, Defendants*; Order Denying Plaintiffs Motion for Summary Judgment; Order Granting Defendants' Motion for Summary Judgment in Part [143] [145] [146] [147] [156] [186] [188], July 16, 2009, p. 14.

a result, the difference in fees for Berger (Janus) Small Cap Value Fund should be excluded from difference in fee calculations.

31. However, if it were to be determined that the fund's share class should have switched from retail to institutional shares in October 2003, when the Plan implemented fund changes, then the difference in fees would be $108,304 from October 2003 until August 31, 2007. Even though the fund's name changed in April 2003, in my calculations I use October 2003 as the date when the fund's share class could have switched from retail to institutional shares. It is my understanding that the Plan fiduciaries met on a quarterly basis and generally would only make changes to the Plan's line-up once each year.[27] Moreover, Hewitt Associates requested that it be provided two to five months to perform the testing and other tasks required for fund changes.[28] October 2003 was the first date after Berger Small Cap Value Fund's name change in April 2003 that the Plan implemented changes to its menu of investment options.

32. If one were also to account for lost investment opportunity, the difference in fees would be $126,635 as of August 31, 2007; $91,567 as of December 31, 2008; or $125,401 as of November 17, 2009. (See Exhibit 4). I have used these dates as the end dates

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[27] Ertel Trial Declaration, ¶ 8; Tong Trial Declaration, ¶ 7; Tong Supp. Declaration, ¶ 12. During the relevant period, the Plan made fund changes in July 2002, October 2003, December 2003, October 2004, January 2005, and October 2005. Ertel Supp. Declaration ¶ 9. For the purposes of my calculations, I use these dates as the dates that the Plan would have realistically changed the share classes for the six funds in question.

[28] Tong Supp. Declaration, ¶ 14; Kobashigawa Supp. Declaration, ¶¶ 5-6.

of my calculations because August 2007 is when the complaint for this case was filed, December 31, 2008 represents the most recent full year for which fund return and balance data are available, and November 17, 2009 is the date with most recent data that I could use in my calculations. The plaintiffs calculate the difference in fees as of December 2007. There is no basis to use December 31, 2007 as the end date of calculations.

33. In their calculations, the plaintiffs use fund returns to account for the lost investment opportunity. In my calculations of the lost investment opportunity, I have used Janus Small Cap Value Fund's returns until the fund was replaced by the Artisan Small Cap Value Fund in October 2007. After that date, I used Artisan Small Cap Value Fund returns as Janus Small Cap Value Fund's assets were mapped into Artisan Small Cap Value Fund.[29]

34. I have also calculated the difference in fees, assuming that the share class change could have been implemented as soon as the Berger Small Cap Value Fund's name was changed in April 2003, regardless of the Plan's schedule for fund changes. As shown in Exhibit 4, the difference in fees would be $117,866 from May 2003 until August 31, 2007. If one were also to account for lost investment opportunity, the difference in fees would be $140,535 as of August 31, 2007, $101,574 as of December 31, 2008, or $139,106 as of November 17, 2009.

35. Plaintiffs calculate the fee difference for the whole year of 2007, whereas I understand that the calculations for difference in fees should end in August 2007.

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[29] Trial Exhibit 1308.

B. PIMCO (Allianz) CCM Capital Appreciation Fund:

36. The PIMCO CCM Capital Appreciation Fund had been in the Plan since March 1999. In 2000 PIMCO was acquired by Allianz SE.[30] In April 2005, PIMCO Multi-Manager Series funds, including the PIMCO CCM Capital Appreciation Fund, were renamed Allianz funds. According to the prospectus filed by Allianz, this name change did not result in a change in the fund's investment objective or the fund's ticker symbol.[31]

37. The fund prospectuses before and after the name change show that William B. Bannick and Robert L. Fitzpatrick continued to manage the fund after the name change.[32]

38. Similarly, the prospectuses of the fund filed before and after the name change show that the investment style remained the same:

PIMCO Prospectus Filed on October 29, 2004:

> The Fund seeks to achieve its investment objective by normally investing at least 65% of its assets in common stocks of companies with larger market capitalizations that have improving fundamentals (based on growth criteria) and whose stock is reasonably valued by the market (based on value criteria).

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[30] PIMCO history. http://www.pimco.com/LeftNav/AboutPIMCO/History.htm, retrieved on November 10, 2009.

[31] Allianz Funds Prospectus as revised on April 1, 2005.

[32] PIMCO Prospectus Filed on October 29, 2004 and Allianz Prospectus Filed on November 1, 2005.

Allianz Prospectus Filed on November 1, 2005:

> The Fund seeks to achieve its investment objective by normally investing at least 65% of its assets in common stocks of companies with market capitalizations of at least $1 billion that have improving fundamentals (based on growth criteria) and whose stock is reasonably valued by the market (based on value criteria).

39. Furthermore, the prospectuses of the fund filed before and after the name change used the same benchmarks (the S&P 500 Index and the Lipper MultiCap Growth Funds Average).[33]

40. In addition, Morningstar did not change its Morningstar category or the benchmarks (the S&P 500 Index and Morningstar Large Growth Index) for this fund after the name change.[34]

41. As stated above, Edison had a well-defined monitoring process in place. A simple "cosmetic" name change, such as what occurred with the PIMCO (Allianz) CCM Capital Appreciation Fund, would not have caused any concerns with regard to any of the criteria included in monitoring, and should not have triggered any additional reviews of the fund, including reconsideration of the Plan's share class decision for this fund.

42. PIMCO (Allianz) CCM Capital Appreciation Fund has been in the Plan since 1999 and merely underwent a "cosmetic" name change in April 2005. The ownership of the fund, its investment style, management, and the benchmarks the fund used did

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[33] PIMCO Funds Multi-Manager Series Prospectus filed on October 29, 2004; Allianz Funds Prospectus filed on November 1, 2005.

[34] Retrieved from Morningstar as of March 31, 2005, and April 30, 2005.

not change after the name change. As a result, this fund should not be included in the calculation of difference in fees.

43. However, if it were to be determined that the fund should have switched from retail to institutional shares in October 2005 when the Plan implemented fund changes, then the difference in fees would be $56,423 from October 2005 until August 2007. If one were also to account for lost investment opportunity, the difference in fees would be $59,709 as of August 31, 2007, $35,512, as of December 31, 2008, or $42,820 as of November 17, 2009. (See Exhibit 4).

44. I have also calculated the difference in fees, assuming that the share class change could have been implemented as soon as the PIMCO CCM Capital Appreciation Fund's name was changed to Allianz CCM Capital Appreciation Fund in April 2005, regardless of the Plan's schedule for fund changes. As shown in Exhibit 4, in this case, the difference in fees would be $65,891. If one were also to account for lost investment opportunity, the difference in fees would be $70,815 as of August 31, 2007, $42,309 as of December 31, 2008, or $51,016 as of November 17, 2009.

45. Plaintiffs calculate the fee difference for the whole year of 2007, whereas I understand that the calculations for difference in fees should end in August 2007.

C. Franklin Small-Mid Cap Growth Fund:

46. The Franklin Small Cap Growth Fund was added to the Plan in March 1999. Before September 1, 2001, the Small-Mid Cap Fund was named Franklin Small Cap Growth Fund I. On that date, there was a change in one of the investment criteria of the fund. Before the change, the fund invested in growth companies with market capitalizations up to $1.5

billion except for companies in the fund's Russell 2000 benchmark. After the change, the fund could invest in companies with market capitalizations up to $8.5 billion.[35] In connection with the change, the fund expanded its main investment strategy, so that it could invest at least 80% of its net assets in small capitalization and mid capitalization growth companies.

47. According to the prospectuses of the fund filed before and after the change, Edward Jamieson, Michael McCarthy, and Aidan O'Connell remained as the core management of the fund.[36] Christopher Gristani and Avinash Satwalker were added to the fund's management team in 2002.

48. I have analyzed the impact of this change on the portfolio of the fund. Based on Morningstar data, the fund's median portfolio market capitalization increased from $1.9 billion as of June 30, 2001 to $2.2 billion as of March 31, 2002.[37] The annual and semi-annual reports filed for the fund show that of the top 10 equities in the portfolio as of April 30, 2001, five were still in the portfolio top 10 list as of October 31, 2001, after the name change.[38] Consistent with the relatively small impact of the change in market capitalization criteria on the fund's portfolio,

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[35] Franklin Strategic Series Prospectus filed on August 29, 2001.

[36] Franklin Strategic Series Prospectus Filed on August 31, 2000, Franklin Strategic Series Prospectus Filed on August 29, 2001, Franklin Strategic Series Prospectus Filed on August 29, 2002.

[37] Retrieved from Morningstar as of June 30, 2001, and March 31, 2002.

[38] Franklin Annual Report (Form N-30D) for the period ending April 30, 2001; Franklin; Franklin Semiannual Report (Form N-30D) for the period ending October 31, 2001.

Morningstar did not change its categorization of the fund (Morningstar categorized the fund as Mid-Cap Growth before and after the change).[39]

49. Although the plaintiffs claim that this fund was added to the Plan as of September 2001, the Franklin Small Cap Growth fund had been in the Plan since 1999. The changes in September 2001 should not be a reason for considering the fund as a new investment option especially when the ownership or the management of the fund did not change and Morningstar did not change its classification of the fund. Furthermore, no new share classes were added in September 2001 as a result of this change. Edison was aware of the change in the investment criteria and the name of the fund. For these reasons, there was no need to undertake a review of the Plan's share class decision with respect to the fund. Given that Franklin Small-Mid Cap Growth Fund was already in the Plan before 2001, this fund should not be included in the calculation of the difference in fees.

50. However, if it were to be determined that the fund should have switched from retail to institutional shares in July 2002 when the Plan implemented fund changes, then the difference in fees would be $129,544 from July 2002 until August 2007. If one were also to account for lost investment opportunity, the difference in fees would be $177,199 as of August 31, 2007, or $111,322 as of December 31, 2008, or $158,856 as of November 17, 2009. (See Exhibit 4).

51. In their calculations, the plaintiffs use fund returns to account for the lost investment opportunity. In my calculations of the lost investment oppor-

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[39] Retrieved from Morningstar as of June 30, 2001, and March 31, 2002.

tunity, I have used Franklin Small-Mid Cap Growth Fund's returns until the fund was replaced by T. Rowe Price Mid-Cap Growth Fund in October 2007. After that date, I used T. Rowe Price Mid-Cap Growth Fund's returns as Franklin Small-Mid Cap Growth Fund's assets were mapped into T. Rowe Price Mid-Cap Growth Fund.[40]

52. I have also calculated the difference in fees, assuming that the share class change could have been implemented as soon as Franklin Small-Cap Growth Fund's name was changed in September 2001, regardless of the Plan's schedule for fund changes. As shown in Exhibit 4, in this case, the difference in fees would be $162,689 from September 2001 until August 2007. If one were also to account for lost investment opportunity, the difference in fees would be $235,313 as of August 31, 2007, $147,909 as of December 31, 2008, or $211,066 as of November 17, 2009.

53. Plaintiffs calculate the fee difference as of September 2007, whereas I understand that the calculations for difference in fees should end in August 2007.

* * *

I declare under penalty of perjury under the laws of the United States of America and pursuant to 28 U.S.C. § 1746 that the foregoing is true and correct and that this Declaration is executed this 18th day of November, 2009 in Dallas, Texas.

/s/ JOHN W. PEAVY III
John W. Peavy III

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[40] Trial Exhibit 1308.

[Attorney Names & Addresses Omitted]

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Case No. CV 07-5359 SVW (AGRx)

GLENN TIBBLE, ET AL.,
Plaintiffs,
v.

EDISON INTERNATIONAL, ET AL.,
Defendants.

SUPPLEMENTAL DECLARATION OF MARVIN TONG IN SUPPORT OF DEFENDANTS' SUPPLEMENTAL BRIEF PURSUANT TO THE COURT'S OCTOBER 26, 2009 ORDER

[Filed Nov. 19, 2009]

I, Marvin Tong, being duly sworn on my oath, declare and state:

1. In this Declaration, I set forth my personal knowledge or my opinions based on my knowledge and experience.

2. I have worked as an Investment Analyst in the Investments Division of the Treasurer's Department at Southern California Edison ("SCE") since January 2003. In this capacity I am a member of SCE's Investments Staff. Edison International is the parent company of SCE (collectively, "Edison").

3. I report to David Ertel, SCE's Director of Investments.

4. Prior to my employment as SCE, I worked at Mercer Investment Consulting as a Senior Analyst for over 3 years. In that position, I worked on employee benefits issues, including consulting services for 401(k) plans. I earned a Bachelor of Science degree in Management Science from the University of California, San Diego. I have also earned the designation of Chartered Financial Analyst and the Chartered Alternative Investment Analyst. These credentials attest to my knowledge and experience in risk and portfolio management, market efficiency and performance measurement and quantitative investment methods.

5. As I stated in my Direct Testimony at trial, the investment criteria that have been approved by the Edison International Trust Investment Committee (the "TIC") and its Chairman's Subcommittee (the "Sub-TIC") (collectively, the "Investment Committees") for evaluating investment options for the Edison 401(k) Savings Plan (the "Plan") include the following: (1) the stability of the fund's overall organization; (2) the fund's investment process; (3) the fund's performance compared to benchmarks and peer groups; (4) the fund's total expense ratio; and (5) with respect to mutual funds, the availability of public information regarding the fund (collectively, the "Investment Criteria"). Under the Investment Criteria, the Investments Staff evaluates a fund's historical performance over a period of at least 3 years. If insufficient performance history is available for an investment option, we will consider the lack of history as an important factor indicating that the fund may not be suitable for the Plan; since, without the performance history, there generally is limited information avail-

able regarding the fund, which is one of the Plan's Investment Criteria.

6. My understanding is that the five investment criteria listed above are the only criteria used by the Investments Staff. As is evident from that list, the availability of so-called "revenue sharing" or "12b-1" fees is not a criterion used by the Investments Staff or the Investment Committees in evaluating funds for inclusion in or removal from the Plan's line-up of investment options, and this has been the case at least since I started working for SCE in January 2003.

7. During the time that I have been a member of the Investments Staff, whenever we have recommended a new mutual fund, we have always recommended the lowest fee share class available that (i) the Plan qualified for based on minimum initial investment requirements, (ii) had a Morningstar rating, and (iii) had a sufficient performance history. By "new" fund I mean a wholly new mutual fund that is being added to the Plan line-up of investment options for the first time. To the extent the Investment Committees have approved the recommended mutual funds, they have also approved these recommended share classes.

Edison's Share Class Policy Was Reasonable

8. Edison has a reasonable policy to make fund changes only when an investment option no longer satisfies the Investment Criteria. If a mutual fund with a retail share class is performing adequately against its benchmark on a net-of-fee basis and is otherwise satisfying the Investment Criteria, Edison's general policy has been not to change to an institutional share class of the same mutual fund. Based on my experience working with 401(k) plans at Edison

and at Mercer, as well as conferences I have attended for 401(k) plan sponsors, I believe Edison's policy of making changes to investment options only when they no longer satisfy the Investment Criteria to be in the mainstream of the way comparable plans are administered. Edison's policy was wholly unrelated to – and did not consider – whether a mutual fund's share class provided revenue sharing.

9. Edison's share class policy was based on several considerations. First, after an unfair labor practice charge was filed by one of Edison's unions in connection with fund changes, the Chairman of one of the Investment Committees "expressed concern about the frequency of fund changes" at a meeting that I attended. (Trial Ex. 277.)[1] He was advised by the Investment Staff that "changes are only made if significant issues arise." (*Id.*) Further, our share class policy was based on concerns about participant confusion and managing administrative limitations. Specifically, changing share classes may confuse participants by resulting in a new ticker symbol to track the fund, and lead to a change in the Net Asset Value for participants' investments in the mutual fund. Those participants who track their portfolios online would have to make manual updates to avoid inaccurate results. Finally, we were concerned about overwhelming Plan participants with a high volume of communications relating to fund changes.

10. The Investments Staff has been advised by the Investment Committees that fund changes generally should only occur once per year. Among other things, this once-per-year guideline provides Hewitt Associates, the third-party administrator for the Plan, the

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[1] Exhibit 277 was admitted into evidence at trial pursuant to a stipulation of counsel on the record.

time needed to perform administrative tasks and testing for fund changes, and it results in participants not being burdened with frequent and possibly confusing barrages of communications about fund changes.

The Name Changes to Two of the Mutual Funds Did Not Constitute Adding a "New" Fund to the Plan

11. I understand that a question has been raised about whether changes to the names of three of the funds in the Plan were mere name changes or instead were substantive changes to these funds' investment strategy and/or management that allegedly should have triggered a full review of the merits of offering these funds as "new" investment options in the Plan lineup. Specifically, the funds in question are the Franklin Small Cap Growth Fund, the Berger Small Cap Value Fund, and the PIMCO CCM Capital Appreciation Fund.

12. With regard to the Franklin Small Cap Growth Fund, this fund was added to the Plan in early 1999. The fund changed its name to the Franklin Small-Mid Cap Growth Fund in September 2001. Since this occurred more than a year before I began working for Edison, I am not addressing that name change.

13. With regard to the Berger Small Cap Value Fund, this fund was added to the Plan in early 1999. The fund changed its name to the Janus Small Cap Value Fund in April 2003. The re-naming of the fund reflected a tax-free reorganization of the Berger fund into a Janus fund, not a significant change in investment policy or objective. None of the fund's features, such as investment objective, style, benchmarks, and the like, changed in connection with the fund being

re-named. This was simply a corporate name change. No "new" fund was added to the Plan. This name change did not require the type of in-depth review the Investments Staff undertakes when recommending a new fund. The name change also did not trigger consideration of a lower fee share class.

14. With regard to the PIMCO CCM Capital Appreciation Fund, this fund was added to the Plan in early 1999. The fund changed its name from the PIMCO CCM Capital Appreciation Fund to the Allianz CCM Capital Appreciation Fund in April 2005. This, too, was merely a name change. Allianz completed its acquisition of PIMCO back in 2000. (*See* http://www.pimco.com/LeftNav/AboutPIMCO/Milestones.htm (last visited on Nov. 3, 2009).) In 2005, the fund name was altered to reflect the fact that Allianz owned PIMCO. None of the fund's features, such as investment objective, style, benchmarks, and so forth, changed after the re-naming. No "new" fund was added to the Plan. This name change did not require the type of in-depth review the Investments Staff undertakes when recommending a new fund, and since the fund satisfied the Investment Criteria at that time, there was no consideration of making a fund change, including moving to a lower fee share class.

15. Based on my experience working for 401(k) plans, I would not consider the corporate name changes to the Berger (Janus) Small Cap Value Fund and the PIMCO (Allianz) CCM Capital Appreciation Fund to be significant changes so as to warrant anything more than a limited review of these funds.

I declare under penalty of perjury under the laws of the United States of America and pursuant to 28 U.S.C. § 1746 that the foregoing is true and correct and that this Declaration is executed this 19th day of November, 2009 in Rosemead, California.

/s/ MARVIN TONG
Marvin Tong

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Case No. CV 07-5359 SVW (AGRx)

GLENN TIBBLE, ET AL.,
Plaintiffs,

v.

EDISON INTERNATIONAL, ET AL.,
Defendants.

ORDER OF JUDGMENT

[Aug. 9, 2010]

Plaintiffs Glenn Tibble, William Bauer, William Izral, Henry Runowiecki, Frederick Suhadolc, and Hugh Tinman, Jr. are representatives of a class certified by this Court comprising the following:

> All persons, excluding the Defendants and other individuals who are or may be liable for the conduct described in this Complaint, who were or are participants or beneficiaries of the Plan and who were, are, or may have been affected by the conduct set forth in the Second Amended Complaint.

Order dated June 30, 2009 (Doc. 286), as amended on August 18, 2009 (Doc. 308).

On July 28, 2010, Plaintiffs filed concurrently with their [Proposed] Order of Judgment an updated damages calculation consistent with the Court's Findings of Fact and Conclusions of Law (Doc. 405),

which shows the damages incurred by the Plan participants due to the difference in fees between the institutional class shares and retail class shares of the William Blair Small Cap Growth Fund, the PIMCO (Allianz) RCM Global Technology Fund, and the MFS Total Return Fund, including lost investment opportunity, from the date the Plan initially invested in the funds listed above through the date Plaintiffs filed their [Proposed] Order of Judgment. The Court finds that calculation to accurately state the Plan's losses resulting from Defendants' breach of fiduciary duties. Judgment is hereby entered in favor of the Plaintiff class on behalf of the Edison 401(k) Savings Plan against all Defendants, jointly and severally, in the amount of $370,732.

Absent a timely appeal and the filing of a supersedeas bond in accordance with Federal Rule of Civil Procedure 62(d), the judgment amount shall be deposited into the Plan's Trust within 30 days from the date of the entry of this Judgment and distributed to the participants who invested in the retail class shares of the MFS Total Return Fund, the William Blair Small Cap Growth Fund, and the PICMO (Allianz) RCM Global Technology Fund from July 2002 to the present within 60 days of the date of the entry of this Judgment.

In making their calculations regarding the allocation of the award of damages, Defendants shall be permitted to allocate the damages amount on a monthly, pro rata basis, with reasonable rules of approximation. Defendants shall be permitted to allocate damages from the fee difference between the institutional class and the retail class of the funds at issue to class members based on class members' relative amounts invested in the affected funds as of the end of each month during the relevant time

period, and to calculate class members' lost investment opportunity cost thereon on a monthly basis through the date Plaintiffs' filed their damages calculation (i.e., July 28, 2010). Moreover, Defendants shall be permitted to use reasonable adjustments to ensure that the amount allocated is the total damages of $370,732 and to employ reasonable rounding and minimum amount rules. Finally, for class members who are participants with account balances, Defendants shall be permitted to invest the allocations into the funds at-issue (and with respect to the funds at-issue that are no longer offered, Defendants shall be permitted to invest the allocations into the funds to which the terminated funds' assets were mapped or defaulted), and for class members who are no longer participants, Defendants shall be permitted to distribute allocations to those class members in accordance with Plan rules.

It is hereby further ordered that Defendants shall replace the retail share class of the William Blair Small Cap Growth Fund with the less expensive but otherwise identical institutional share class of the same fund.

Finally, judgment is entered in favor of Defendants and against Plaintiffs as to the following issues raised in or subsequent to the Second Amended Complaint:

1. Defendants did not breach their duty of loyalty under ERISA by investing in retail share classes rather than institutional share classes of the William Blair Small Cap Growth Fund, the PIMCO (Allianz) RCM Global Technology Fund, the MFS Total Return Fund, the Franklin Small-Mid Cap Growth Fund, the Berger (Janus) Small Cap Investors Fund, and the Allianz CCM Capital Appreciation Fund.

2. Defendants did not breach their duty of prudence in continuing to offer the retail share classes and not switching to the institutional share classes of the Berger (Janus) Small Cap Investors Fund in April 2003; the Allianz CCM Capital Appreciation Fund in April 2005; or the Franklin Small-Mid Cap Growth Fund in September 2001.
3. Defendants did not breach their duty of prudence by investing in the Money Market Fund managed by SSgA or with respect to the management fee for the Money Market Fund at any point from 1999 to the present.
4. Defendants did not breach their fiduciary duties by including mutual funds as Plan investment options.
5. Defendants' receipt of revenue sharing from certain mutual funds which offset their payments to the Plan's recordkeeper, Hewitt Associates, did not constitute a prohibited transaction under 29 U.S.C. § 1106(b)(2) or 29 U.S.C. § 1106(b)(3).
6. Defendants did not violate the governing Plan instruments under 29 U.S.C. § 1104(a)(1)(D) by allowing some of the fees paid to Hewitt Associates to come from revenue-sharing arrangements.
7. Defendants did not violate the governing Plan instruments by allowing some of the compensation for the Plan Trustee, State Street, to be paid from float.
8. Defendants did not violate 29 U.S.C. § 1106(a)(1)(D), § 1106(b)(1), or § 1104(a) by allowing State Street to retain float.

9. Defendants did not violate their duty of prudence under § 1104(a)(1)(B) by doing any of the following: (a) selecting sector funds, such as the T. Rowe Price Science & Technology Fund, for inclusion in the Plan in 1999; (b) including a money market fund in the Plan rather than a stable value fund; and (c) structuring the Edison Stock Fund as a unitized fund instead of a direct ownership fund.

On all other claims asserted in the Second Amended Complaint, judgment is entered in favor of Defendants and against Plaintiffs.

IT IS SO ORDERED.

DATED: 08/09/10 /s/ STEPHEN V. WILSON
STEPHEN V. WILSON
UNITED STATES
DISTRICT JUDGE

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

SCOTT S. HARRIS
Clerk of the Court
(202) 479-3011

October 2, 2014

Mr. Jerome J. Schlichter
Schlichter Bogard & Denton LLP
100 South Fourth Street
Suite 900
St. Louis, MO 63102

Re: Glenn Tibble, et al.
v. Edison International, et al.
No. 13-550

Dear Mr. Schlichter:

The Court today entered the following order in the above-entitled case:

The petition for a writ of certiorari is granted limited to the following question: "Whether a claim that ERISA plan fiduciaries breached their duty of prudence by offering higher-cost retail-class mutual funds to plan participants, even though identical lower-cost institution-class mutual funds were available, is barred by 29 U. S. C. § 1113(1) when fiduciaries initially chose the higher-cost mutual funds as plan investments more than six years before the claim was filed."

Sincerely,

/s/ SCOTT S. HARRIS

Scott S. Harris, Clerk

PETITIONER'S BRIEF

No. 13-550

IN THE
Supreme Court of the United States

GLENN TIBBLE, ET AL.,
Petitioners,

v.

EDISON INTERNATIONAL, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR PETITIONERS

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December 2, 2014

QUESTION PRESENTED

Whether a claim that ERISA plan fiduciaries breached their duty of prudence by offering higher-cost retail-class mutual funds to plan participants, even though identical lower-cost institutional-class mutual funds were available, is barred by 29 U.S.C. § 1113(1) when fiduciaries initially chose the higher-cost mutual funds as plan investments more than six years before the claim was filed.

LIST OF PARTIES TO THE PROCEEDING

Petitioners Glenn Tibble, William Bauer, William Izral, Henry Runowiecki, Frederick Suhadolc, and Hugh Tinman, Jr. were plaintiffs in the district court and appellants/cross-appellees in the court of appeals.

Respondents Edison International, The Edison International Benefits Committee f/k/a The Southern California Edison Benefits Committee, Edison International Trust Investment Committee, Secretary of the Edison International Benefits Committee, Southern California Edison's Vice President of Human Resources, and Manager of Southern California Edison's HR Service Center were defendants in the district court and appellees/cross-appellants in the court of appeals.

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INTRODUCTION

This case concerns the timeliness of breach-of-fiduciary-duty claims under the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 *et seq.* ("ERISA"). Petitioners brought this suit in 2007 alleging that, between 2001 and 2007, respondent fiduciaries of the Edison 401(k) retirement plan breached their duty to provide prudent investments for plan participants by offering "retail-class shares" of six mutual funds as investment options, despite the availability of "institutional-class shares" of those same funds. The retail-class shares were identical to the institutional-class shares in every way, save that the retail-class shares charged significantly higher fees, thus reducing the retirement assets of plan participants. Throughout that six-year period, despite conducting quarterly reviews of plan investments, respondents failed to consider the less-expensive institutional-class shares, and they continued to provide the costlier retail-class shares for years without justification. When petitioners filed suit in 2007, the plan still offered retail-class shares of five of the six mutual funds.

Of the six funds at issue, three were added to the Edison plan in 1999 and three were added in 2002. Both the district court and the Ninth Circuit concluded that respondents breached their duty of prudence under ERISA by offering the retail-class shares instead of the institutional-class shares as to the three funds added in 2002. The district court concluded, following a bench trial, that respondents "ha[d] not offered any credible explanation" for offering retail-class shares that "cost the Plan participants wholly unnecessary fees." App. 130, 142. The Ninth Circuit affirmed that judgment, and respondents did not cross-petition to challenge that ruling.

Although the pertinent facts underlying the claimed breaches of fiduciary duty were the same for the funds added in 1999, the Ninth Circuit affirmed the district court's judgment that petitioners' claims for breach as to those three funds were untimely under the six-year limitations provision of 29 U.S.C. § 1113(1). Section 1113(1) requires claims to be filed within six years of "(A) the date of the last action which constituted a part of the breach or violation, or (B) in the case of an omission the latest date on which the fiduciary could have cured the breach or violation." 29 U.S.C. § 1113(1). The Ninth Circuit's ruling was erroneous and should be reversed.

Petitioners' claims are timely because they derive not from the imprudent *addition* of the retail-class shares outside the limitations period but from the imprudent *management* of the plan during the limitations period. ERISA's fiduciary duty of prudence, derived from the common law of trusts, requires plan fiduciaries to examine periodically the prudence of existing investments and to remove imprudent investments within a reasonable period of time. When an ERISA fiduciary fails to fulfill that obligation, it breaches its duty of prudence under the Act. Each such breach gives rise to a new claim, actionable for six years under § 1113(1). The statute's text – which starts the limitations clock on the date of the "last action which constituted a part of the breach or violation" or the "latest date on which the fiduciary could have cured the breach or violation" – could hardly be clearer on that point.

That interpretation of § 1113(1) serves ERISA's statutory purposes. The Ninth Circuit's rule immunizes fiduciaries from ERISA liability – and deprives plan participants of any relief – for their failure to

manage plan assets prudently, once the initial plan investment selection is more than six years old. Given the average length of time to retirement for the typical ERISA-covered worker and the addition of new participants to a plan each year, Congress could not have intended to leave participants powerless to remedy imprudent investments that had been in place for more than six years. The court of appeals' concern that permitting such suits would resuscitate stale claims has no merit, because such claims will turn on whether the investments and the fiduciaries' conduct were imprudent during the limitations period, as they were conclusively so proved here.

OPINIONS BELOW

The court of appeals' amended opinion (App. 1-64) is reported at 729 F.3d 1110. The original opinion is reported at 711 F.3d 1061. The district court's post-trial Findings of Fact and Conclusions of Law (App. 65-165) is unreported (but is available at 2010 U.S. Dist. LEXIS 69119). The district court's order granting summary judgment in part (App. 166-268) is reported at 639 F. Supp. 2d 1074.

JURISDICTION

The court of appeals issued its opinion and judgment on March 21, 2013. 711 F.3d 1061. The court of appeals issued an amended opinion and denied a petition for rehearing on August 1, 2013. App. 12. A petition for a writ of certiorari was filed on October 30, 2013, and granted on October 2, 2014, limited to the first question presented as formulated by the Court (JA241). The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant provisions of ERISA are reproduced in the addendum to this brief.

STATEMENT OF THE CASE

A. Statutory Background

ERISA regulates persons acting as fiduciaries of employee retirement plans. Congress enacted ERISA to protect "the interests of participants in employee benefit plans and their beneficiaries, . . . by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts." 29 U.S.C. § 1001(b).

ERISA imposes duties of loyalty and prudence on plan fiduciaries. *See id.* § 1104(a)(1); *Varity Corp. v. Howe*, 516 U.S. 489, 496-97 (1996). Plan fiduciaries must act loyally, that is, "solely in the interest of the participants and beneficiaries" and "for the exclusive purpose" of providing benefits and defraying reasonable administrative expenses. 29 U.S.C. § 1104(a)(1)(A). They also must act prudently, that is, "with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims." *Id.* § 1104(a)(1)(B); *see Fifth Third Bancorp v. Dudenhoeffer*, 134 S. Ct. 2459, 2463, 2467 (2014) (ERISA "requires the fiduciary of a pension plan to act prudently in managing the plan's assets" and "'imposes a "prudent person" standard by which to measure fiduciaries' investment decisions'") (quoting *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 143 n.10 (1985)).

ERISA requires a plan fiduciary to make good any losses to the plan caused by that fiduciary's breach of statutory duties. *See* 29 U.S.C. § 1109(a). The Act also authorizes plan participants to sue on behalf of the plan to recover the relief provided for in § 1109(a). *See id.* § 1132(a)(2); *LaRue v. DeWolff, Boberg & Assocs., Inc.*, 552 U.S. 248, 256 (2008).

ERISA contains a limitations provision governing breach-of-fiduciary-duty claims, which provides in full as follows:

> No action may be commenced under this subchapter with respect to a fiduciary's breach of any responsibility, duty, or obligation under this part, or with respect to a violation of this part, after the earlier of –
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> (1) six years after (A) the date of the last action which constituted a part of the breach or violation, or (B) in the case of an omission the latest date on which the fiduciary could have cured the breach or violation, or
>
> (2) three years after the earliest date on which the plaintiff had actual knowledge of the breach or violation;
>
> except that in the case of fraud or concealment, such action may be commenced not later than six years after the date of discovery of such breach or violation.

29 U.S.C. § 1113.

B. Background Of The Parties' Dispute

1. Petitioners are participants in an ERISA plan for current and former employees of the subsidiaries of respondent Edison International. App. 13. The plan is a defined-contribution plan, meaning that participants' retirement benefits are limited to the value of their own individual investment accounts,

which is determined by employee and employer contributions plus market performance, minus expenses. *Id.*; *see* 29 U.S.C. § 1002(34); *LaRue*, 552 U.S. at 250 n.1, 255; *id.* at 262 (Thomas, J., concurring in the judgment). Expenses can significantly reduce the value of an account in a defined-contribution plan.[1]

Many participants in defined-contribution plans invest some or all of their contributions in mutual funds,[2] which are "pool[s] of assets, consisting primarily of portfolio securities." *Burks v. Lasker*, 441 U.S. 471, 480 (1979). The mutual fund deducts fees from the fund's assets, thereby reducing the value of the shares owned by fund investors. App. 79-80. Mutual-fund fees are usually expressed as a percentage of the assets under management, or expense ratio. *Id.* For example, if the investment company deducts 1% of the fund's assets each year in fees, then that fund's expense ratio would be 1%.

Many mutual funds also engage in a practice known as "revenue sharing." App. 78-80. In a revenue-sharing arrangement, a mutual fund pays a portion of the fees it charges investors to an entity that provides administrative services to a retirement plan. *Id.* To illustrate, an employer that sponsors a retirement plan might hire an outside firm to provide administrative services to the plan. If the plan included as an investment option a mutual fund that

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[1] *See, e.g.*, U.S. Dep't of Labor, *A Look at 401(k) Plan Fees* 1-2 (Aug. 2013) (illustrating impact of expenses with example in which 1% difference in fees and expenses over 35 years reduces participant's account balance at retirement by 28%), http://www.dol.gov/ebsa/pdf/401kFeesEmployee.pdf.

[2] *See* Investment Company Inst., *2014 Investment Company Fact Book* 11 (54th ed. 2014) (reporting that, in 2013, mutual funds managed 60% of the assets in defined-contribution plans), http://www.ici.org/pdf/2014_factbook.pdf.

offers revenue sharing, the outside service provider would receive revenue-sharing payments from that fund. App. 80. The amounts of those payments would depend on the extent of investments by plan participants in the fund. App. 233. The revenue sharing received by the service provider might in some cases offset part or all of the fees that the employer or plan administrator would otherwise have to pay that service provider for services furnished to the plan. App. 80. Revenue sharing thus provides an incentive for service providers to recommend and plan fiduciaries to select as investment options mutual funds that offer greater revenue sharing, even though that results in higher expenses for plan participants.

2. The fiduciaries of the Edison plan provide a set of plan investments for participants to choose from, including a number of mutual funds. App. 13-14, 72-73, 78. This appeal concerns six of those mutual funds. App. 84.

Each of the six funds at issue offered investors a choice of two share classes. App. 14, 68. One share class was marketed to individual retail investors, and the other to larger institutional investors. App. 14, 83-84. There "were no salient differences in the investment quality or management" between the two share classes. App. 61; *see* App. 83-84, 128-29. But "the retail share classes charged higher fees to the Plan participants." App. 128-29; *see* App. 61, 83-84. Although the institutional-class shares advertised minimum-investment requirements, the Edison plan (with $3.8 billion in assets under management) could have either satisfied those requirements or obtained a waiver from the fund managers. App. 13, 61 & n.24, 137-41.

For each of the six mutual funds, respondents provided to participants the more expensive retail-class shares, rather than the materially identical and less expensive institutional-class shares. App. 68. The retail-class shares offered larger revenue-sharing payments to the firm (Hewitt Associates) that provided administrative services to the Edison plan.[3] *Id.* ("The retail share classes of the six mutual funds offered more favorable revenue-sharing arrangements to [Edison] but charged the Plan participants higher fees than the institutional share classes."); App. 84 ("The retail share classes of each of [the six] funds had higher expense ratios than the institutional share classes; the higher fees were directly related to the fact that the retail share classes offered more revenue sharing."); *see* App. 14, 78-80.

3. Two committees, the Edison International Trust Investment Committee (a defendant below and a respondent here) and the Chairman's Subcommittee, chose what investment options to provide participants for investing their retirement savings.[4] The committees were fiduciaries of the Edison plan. JA143 (¶ 5).

The investment committees' staff was "responsible for monitoring and evaluating the investments for the Plan." App. 74.[5] The staff provided "information and recommendations to the Investment Committees regarding which investment options to maintain or

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[3] An affiliate of Hewitt Associates, Hewitt Financial Services, provides investment advice to the Edison investment committees' staff. App. 75.

[4] App. 72, 74, 169-70; JA102-07; JA113-16; JA118-20 (¶¶ 40-48).

[5] *See* App. 75-77; JA115-16; JA122-24 (¶¶ 54-59), 128-29 (¶¶ 75-80); JA151-52 (¶¶ 8-9), 154 (¶¶ 15-16); JA183-84.

replace." *Id.* The investment committees received "ongoing reports regarding Plan investments and their performance from the Investments Staff." JA120-21 (¶ 49).

The investment committees met quarterly to review plan investments.[6] At those meetings, the staff provided the committees with "reports regarding the performance and related status of the assets of the Plan as a whole." JA144 (¶ 11).[7] The committees considered at the quarterly meetings whether to remove, replace, or add investment options based on the staff's recommendations, functionally deciding which investment options would be offered to plan participants. App. 74-75, 77.[8] On numerous occasions, the committees removed investment options from the plan. App. 76-78; JA164-67.

During the time period relevant here (2001-2007), although the committees reviewed the plan's investment options on a periodic basis and made numerous changes to those options, they provided plan participants with the more expensive but otherwise iden-

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[6] *E.g.*, App. 94 ("On June 30, 2003, the Trust Investment Committee/Chairman's Subcommittee ('Sub-TIC') held a meeting in which they reviewed the funds for the Plan . . . ."); App. 95 ("In June 2005, the Sub-TIC held a meeting in which they reviewed the funds for the Plan . . . ."); *see* JA143 (¶ 6) ("One or both of the Investment Committees has generally met each quarter since 2001."); JA121 (¶ 50) (same); JA164-67 (minutes from one of the committees' meetings).

[7] *See* App. 74-75 ("On a quarterly basis, the Investments Staff attends the meetings of the Investment Committees and gives presentations regarding the Plan's overall performance."); JA125 (¶¶ 64-66); JA151 (¶ 8); JA164-67.

[8] *See* JA125-26 (¶¶ 65, 67, 70), 129 (¶ 80); JA144 (¶ 11); JA164-67.

tical retail-class shares of the six mutual funds at issue. App. 84-98.

C. Proceedings In The District Court

1. On August 16, 2007, petitioners brought suit under ERISA against respondents in federal court. App. 14, 65. They alleged multiple ways in which respondents failed to comply with their statutorily imposed fiduciary duties to the plan. JA71-87 (¶¶ 49-102). Relevant here, petitioners alleged that respondents breached their fiduciary obligations by "subjecting the Plan and its participants to the high costs of retail/publicly-traded mutual funds and failing to provide investment options with significantly lower costs." JA76 (¶ 73); *see* JA77 (¶ 78) ("Defendants breached their fiduciary duties by subjecting the Plan to pay the excess and unnecessary fees of retail mutual funds."); JA92 (¶ 105(I)-(J)).

2. The parties filed cross motions for summary judgment; the district court denied petitioners' motion and granted respondents' motion in part. App. 66-69, 166-268; JA131-41. Relevant here, respondents argued on the last page of their summary judgment motion that "[a]ll claims arising before August 16, 2001" – that is, six years before the complaint was filed – "are barred by ERISA's statute of limitations." Mem. in Support of Defs.' Mot. for Summ. J. at 24 (May 18, 2009) (Doc. 146-2). The pertinent portion of ERISA's limitations provision, which is quoted in full above, states that no action for breach of fiduciary duty may be commenced more than "six years after (A) the date of the last action which constituted a part of the breach or violation, or (B) in the case of an omission the latest date on

which the fiduciary could have cured the breach or violation." 29 U.S.C. § 1113(1).[9]

The district court ruled that § 1113(1) barred petitioners' claims arising from respondents' offering of mutual funds that were first selected as plan investments more than six years before the complaint was filed. App. 178-81, 247-48, 262-63. The court reasoned that "[t]here is no 'continuing violation' theory" under ERISA. App. 180. Three of the six mutual funds at issue were first included as plan investments in March 1999, more than six years before the filing of the complaint in August 2007. App. 92-98. The other three funds were added to the plan in July 2002, within the six-year limitations period. App. 85-92.

3. After a bench trial on the claims remaining after its summary judgment rulings, the district court issued findings of fact and conclusions of law. App. 65-165. With respect to the three funds added to the plan in 2002, the court held that respondents breached their duty of prudence by offering retail-class shares of mutual funds as plan investments when identical lower-cost institutional-class shares of those same funds were available. App. 68-69, 84-92, 128-42. The court found that respondents "could not offer any credible reason why the Plan fiduciaries chose the retail share classes." App. 134. In fact, the court found "***no evidence*** that Defendants even considered or evaluated the different share classes

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[9] Section 1113 also bars claims filed more than "three years after the earliest date on which the plaintiff had actual knowledge of the breach or violation." 29 U.S.C. § 1113(2). Both courts below rejected respondents' reliance on that provision, App. 19-21, 181, and respondents did not cross-petition on that issue.

. . . when the funds were added to the Plan." App. 129. The investment committees "were not informed about the institutional share classes and did not conduct a thorough investigation." App. 130.

The district court concluded that, "had the Investments Staff and the Investment Committees considered the institutional share classes," they "would have realized that the institutional share classes offered the exact same investment at a lower cost to the Plan participants" and "would have known that investment in the retail share classes would cost the Plan participants wholly unnecessary fees." *Id.* The court held that, "[i]n light of the fact that the institutional share classes offered the exact same investment at a lower fee, a prudent fiduciary acting in a like capacity would have invested in the institutional share classes." App. 142.

The district court also observed that, in the one instance in which respondents did consider the fee differential between retail-class and institutional-class shares, they decided to invest in the institutional-class shares. App. 131-32. In 2003, the investment staff reviewed the available share classes for one of the funds at issue (the PIMCO global technology fund) because they were considering transferring a large amount of assets from another fund into the PIMCO fund. App. 131. The staff confirmed that the institutional-class shares were cheaper for investors. *Id.* On the staff's recommendation, the committees transferred the retail-class shares of the PIMCO global technology fund into the institutional-class shares. *Id.* The district court found those facts "very telling: In the one instance in which the Plan fiduciaries actually reviewed the different share classes of one of these three funds, the fiduciaries realized that

it would be prudent to invest in the institutional share class rather than the retail share class." App. 131-32. "Had they done this diligence earlier," the court found, "the same conclusion would have been apparent with regard to all three funds" added in 2002, "and the Plan participants would have saved thousands of dollars in fees." App. 132.[10]

In light of its summary judgment ruling that § 1113(1) barred petitioners' claims with respect to the three funds added to the plan before 2001, the court limited its finding of a violation to the three mutual funds first provided to plan participants within six years of the filing of petitioners' lawsuit. App. 128-42. The court permitted petitioners to argue that "significant changes during the statute of limitations period . . . should have triggered Defendants to conduct a full due diligence review" of the three funds added before 2001. App. 127. But it concluded that none of the events raised by petitioners was sufficiently significant to require a full due diligence review of the available share classes and associated fees. App. 68-69, 142-50; JA239 (¶ 2).

4. As of the district court's post-trial decision, respondents continued to provide participants retail-class shares of two of the six funds at issue – the William Blair Fund and the Allianz fund. App. 86, 96.[11]

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[10] In contrast to its finding with respect to the duty of *prudence*, the district court concluded that respondents did not breach the duty of *loyalty* in deciding to invest in retail- rather than institutional-class shares. App. 117-25. It found an absence of evidence that "the fiduciaries' decisions were *motivated by* a desire to serve the interests of" Edison over those of the beneficiaries. App. 126 n.19.

[11] The investment committees had eliminated three of the other four funds as investment options at various points in time

The district court ordered respondents to replace the retail-class shares with institutional-class shares for the William Blair fund, which was first added to the plan in 2002. App. 164; JA238. The court failed, however, to provide that relief as to the Allianz fund, which was added in 1999.

D. The Court Of Appeals' Decision

On appeal, each side challenged various aspects of the district court's rulings. The Ninth Circuit affirmed the district court's judgment in full. App. 1-64.

1. Supported by the Department of Labor as *amicus curiae*, petitioners challenged the district court's conclusion that § 1113(1) barred petitioners' imprudence claims relating to the three mutual funds first offered more than six years before the complaint was filed. The court of appeals sustained the district court's interpretation. App. 16-19.

The Ninth Circuit viewed the initial designation of the investment as the start of the "six-year period under section [1113](1)(A) for claims asserting imprudence in the design of the plan menu." App. 17. It opined that "the mere continued offering of a[n] [imprudent] plan option" does not constitute "a subsequent breach" because ERISA does not permit "a 'continuing violation theory,'" which it previously had rejected under a different part of ERISA's limitations provision. *Id.* (citing *Phillips v. Alaska Hotel &*

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for reasons unrelated to the fee differential between retail-class shares and institutional-class shares. App. 92, 94, 98. With respect to the sixth fund – the PIMCO global technology fund – the investments committees converted the retail-class shares to institutional-class shares in 2003, as noted above. App. 88-89, 131-32.

Rest. Emps. Pension Fund, 944 F.2d 509, 520-21 (9th Cir. 1991) (interpreting 29 U.S.C. § 1113(2))).

The court also expressed concern that allowing claims relating to the continued offering of imprudent investments could result in stale claims challenging previous actions by plan fiduciaries. App. 18 ("institutional memory may no longer exist") (internal quotation marks omitted). It also rejected the Department of Labor's argument "that our holding will give ERISA fiduciaries carte blanche to leave imprudent plan menus in place," App. 19, reasoning that participants would still be permitted "to put on evidence that significant changes in conditions occurred within the limitations period that should have prompted a full due diligence review of the funds," *id.* (internal quotation marks omitted).

2. On cross-appeal, respondents challenged the district court's ruling that they breached their duty of prudence in offering the three retail-class mutual funds added to the plan in July 2002. Rejecting that challenge, the Ninth Circuit explained that "[t]he trial evidence . . . shows that an experienced investor would have reviewed all available share classes and the relative costs of each when selecting a mutual fund." App. 63. It noted that the district court had found "an utter absence of evidence that Edison considered the possibility of institutional classes for the funds litigated" – an absence the court of appeals described as "startling." App. 63-64. The court of appeals had "little difficulty agreeing with the district court that Edison did not exercise" the prudence required by the statute "in the selection of these retail mutual funds." App. 64.

SUMMARY OF ARGUMENT

I. Petitioners brought timely claims that, within the six years preceding the suit, respondents breached their obligations to review periodically the prudence of investments and to remove imprudent investments.

A. ERISA's duty of prudence, like many of ERISA's fiduciary provisions, was "derived from the common law of trusts." *Central States, Se. & Sw. Areas Pension Fund v. Central Transp., Inc.*, 472 U.S. 559, 570 (1985). This Court therefore routinely consults background principles of trust law in interpreting ERISA's fiduciary provisions.

Leading trust authorities confirm that a trustee has an ongoing duty to monitor periodically the prudence of existing investments. When a trust contains an imprudent investment, the trustee's fiduciary obligation is to remove the investment within a reasonable time. Further, the trustee's obligation to reexamine investments and remove imprudent ones is not limited to situations in which significant changes have occurred. Rather, a trustee must review trust investments "currently as changes occur, *and also* by a systematic consideration of all the investments of the trust at regular intervals." George T. Bogert et al., *The Law of Trusts and Trustees* § 684, at 147-48 (3d ed. 2009) ("*Bogert's Trusts & Trustees*") (emphasis added). Thus, a trustee that makes an imprudent investment and fails to review or remove it over time has committed multiple separate breaches.

B. Under § 1113(1), every breach of the obligation to review investments prudently and remove imprudent ones starts the running of a new limitations period. As this Court has confirmed in other contexts, a plaintiff may recover for breaches committed

within the applicable limitations period, even if those breaches relate to other breaches outside the limitations period. *See Petrella v. Metro-Goldwyn-Mayer, Inc.*, 134 S. Ct. 1962, 1969 (2014); *Bay Area Laundry & Dry Cleaning Pension Trust Fund v. Ferbar Corp. of California*, 522 U.S. 192, 208 (1997). Section 1113(1)'s text, which allows a plaintiff to bring suit within six years of "(A) the date of the *last action* which constituted a part of the breach or violation, or (B) in the case of an omission the *latest date* on which the fiduciary could have cured the breach or violation," 29 U.S.C. § 1113(1) (emphases added), makes that principle explicit here.

C. Petitioners presented ample evidence that respondents breached their fiduciary duty of prudence during the limitations period. Throughout that period, respondents provided retail-class shares of mutual funds, despite the availability of institutional-class shares of the same funds that provided the same investment with lower fees. Respondents reviewed plan investment options quarterly, yet evidently failed to recognize that the plan participants were paying unnecessary fees and failed to switch to the lower-cost (but otherwise identical) institutional-class shares. Those failures constitute breaches of the obligation to examine investments periodically and to remove imprudent investments, regardless of whether they are viewed as breaches by action (imprudent periodic reviews resulting in retention of imprudent investments) or by omission (imprudent failures to consider institutional-class shares and remove imprudent retail-class shares). A fiduciary that has "held . . . patently unsound investments" has "fail[ed] to invest prudently," and plan participants may recover for harm "attributable

to action [the defendants] took or failed to take during th[e] [limitations] period." *Fink v. National Sav. & Trust Co.*, 772 F.2d 951, 962-63 (D.C. Cir. 1985) (Scalia, J., concurring in part and dissenting in part) (citing *Buccino v. Continental Assurance Co.*, 578 F. Supp. 1518, 1520-23 (S.D.N.Y. 1983)).

II. The Ninth Circuit erred in affirming the grant of summary judgment. *First*, the Ninth Circuit misconstrued petitioners' legal claims as an attempt to recover for the addition of the retail-class shares outside of the limitations period. The court's analysis improperly disregarded petitioners' claims of independent breaches committed within the limitations period. *Second*, the Ninth Circuit expressed misguided concern that a contrary holding would expose ERISA fiduciaries to liability for decades-old decisions to add investments. In fact, claims based on imprudent retention of investments will depend on the prudence of the investment and the fiduciary's conduct during the limitations period, not the prudence of the initial decision to add the investment. *Third*, the Ninth Circuit unjustifiably ignored petitioners' argument that respondents' failures to remove the retail-class shares constituted imprudent "omission[s]" under § 1113(1)(B). *Fourth*, the Ninth Circuit wrongly limited the obligation to reexamine and remove imprudent investment options to situations in which "significant changes in conditions . . . should have prompted a full due diligence review." App. 19 (internal quotation marks omitted). An ERISA fiduciary's duty of prudence is not so limited.

III. A rule barring claims for the imprudent retention of investment options added outside the limitations period would hinder ERISA's protective and remedial policies.

A. Congress enacted ERISA to protect employees and their beneficiaries from abuse and mismanagement of the funds in their benefit plans, including imprudent investment of such funds. When enacting ERISA, Congress declared it "to be the policy of [ERISA] to protect . . . the interests of participants in employee benefit plans and their beneficiaries . . . by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts." 29 U.S.C. § 1001(b). ERISA must be interpreted in light of these protective and remedial policies.

B. The Ninth Circuit's holding would undermine ERISA's policies by immunizing plan fiduciaries from an ongoing duty of prudence in managing plan assets and depriving new plan participants and beneficiaries of any remedy against imprudent investment options that had been provided for more than six years. Thus, a participant joining a plan with a menu of imprudent, but longstanding, investment options could not even obtain injunctive relief to remove those imprudent investments. Neither ERISA's text nor sound policy supports such an absurd result.

ARGUMENT

I. PETITIONERS' CLAIMS FOR BREACHES OF FIDUCIARY DUTIES WITHIN THE SIX YEARS PRECEDING THE COMPLAINT'S FILING WERE TIMELY

The relevant portion of ERISA's limitations provision does not begin to run until, at a minimum, the defendant fiduciary has committed a "breach of any responsibility, duty, or obligation" under ERISA's fiduciary provisions or otherwise violated the statute. 29 U.S.C. § 1113. Specifically, § 1113(1) requires a claim to be filed within six years of either "(A) the date of the last action which constituted a part of the breach or violation, or (B) in the case of an omission the latest date on which the fiduciary could have cured the breach or violation." *Id.* § 1113(1). Both clauses of that provision require a "breach or violation" before the six-year period begins to run. To be sure, the limitations period does not inevitably begin running at the moment the fiduciary first acts or omits to act in a way that violates the statute: in the case of a breach by action, the period commences on "the date of the last action which constituted a part of the breach"; in the case of a breach by omission, the period starts running on "the latest date on which the fiduciary could have cured the breach or violation." *Id.* Under no circumstances, however, could the six-year period begin to run before the fiduciary has committed the "breach or violation" giving rise to the plan participant's claim.

Accordingly, to apply § 1113(1) properly, it is necessary first to determine the nature of the asserted

breach of fiduciary duty.[12] ERISA's duty of prudence imposes an obligation on plan fiduciaries such as respondents to review the prudence of plan investments periodically and to remove imprudent investments. Each failure to fulfill that duty constitutes a separate "breach or violation" of ERISA, triggering a new six-year period under § 1113(1) in which plan participants can commence an action with respect to that breach. Here, respondents conducted imprudent periodic reviews and thereby failed to remove imprudent investments multiple times within the six years preceding the filing of this action. The lower courts therefore erred in dismissing petitioners' claims as untimely.

A. ERISA Imposes An Obligation On Plan Fiduciaries To Review The Prudence Of Plan Investments Periodically And Remove Imprudent Investments

ERISA imposes a duty of prudence on plan fiduciaries. The statute requires a fiduciary to "discharge his duties with respect to a plan . . . with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims." 29 U.S.C. § 1104(a)(1)(B). This Court looks to background principles of trust law to define the contours of an ERISA fiduciary's duty of prudence. Trust law has long provided that a fiduciary's duty of prudence encompasses a responsibility to review investments periodically and to remove

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[12] *Cf. Lewis v. City of Chicago*, 560 U.S. 205, 214 (2010) (in applying Title VII time bar, whether plaintiff has alleged "a 'present violation' within the limitations period . . . depends on the claim asserted").

imprudent ones. That duty of review and removal is not limited to cases in which the beneficiary can prove significant changes in circumstances affecting the investment.

1. ERISA's duty of prudence is informed by background principles of trust law

The Court has long recognized that ERISA's "fiduciary responsibility provisions 'codif[y] and mak[e] applicable to [ERISA] fiduciaries certain principles developed in the evolution of the law of trusts.'" *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 110 (1989) (quoting H.R. Rep. No. .93-533, at 11 (1973), *reprinted in* 1974 U.S.C.C.A.N. 4639, 4649) (alterations in original, citations omitted); *see also Central States, Se. & Sw. Areas Pension Fund v. Central Transp., Inc.*, 472 U.S. 559, 570 (1985) ("[R]ather than explicitly enumerating *all* of the powers and duties of trustees and other fiduciaries, Congress invoked the common law of trusts to define the general scope of their authority and responsibility."); *Fifth Third Bancorp v. Dudenhoeffer*, 134 S. Ct. 2459, 2465, 2472 (2014).

The Court therefore "look[s] to 'principles of trust law' for guidance" when interpreting ERISA's fiduciary provisions, particularly on matters not directly addressed by the text of ERISA. *Conkright v. Frommert*, 559 U.S. 506, 512 (2010) (quoting *Firestone*, 489 U.S. at 111). For example, in *Central States*, the Court looked to the power of common law trustees to take all appropriate actions necessary to carry out the trust's purposes to conclude that an ERISA fiduciary had the power to conduct an audit of the employment records of a member employer. 472 U.S. at 569-72. Similarly, in *Firestone*, the Court adopted from trust law the principle that a deferen-

tial standard of review applies where an ERISA plan grants the fiduciary discretion to make a benefits determination. 489 U.S. at 111, 114. In ascertaining the relevant trust law principles, the Court routinely draws on leading authorities such as the Scott and Bogert treatises and the Restatements of Trusts.[13]

"[T]he law of trusts often will inform, but will not necessarily determine the outcome of, an effort to interpret ERISA's fiduciary duties." *Varity Corp. v. Howe*, 516 U.S. 489, 497 (1996). That is in significant part because "ERISA's standards and procedural protections partly reflect a congressional determination that the common law of trusts did not offer completely satisfactory protection." *Id.*; *see, e.g.*, *Dudenhoeffer*, 134 S. Ct. at 2469 ("[B]y contrast to the rule at common law, trust documents cannot excuse trustees from their duties under ERISA.") (internal quotation marks omitted). ERISA's fiduciary duties generally track common law trust duties except when "the language of the statute, its structure, or its purposes require departing from common-law trust requirements." *Varity*, 516 U.S. at 497. In *Varity*, for example, the Court concluded there was "no adequate basis . . . , in the statute or otherwise," to justify "a departure from ordinary trust law principles" that deception violates the duty of loyalty. *Id.* at 506.

In this case, nothing in ERISA suggests that Congress intended to relax the common law trust

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[13] *See, e.g.*, *CIGNA Corp. v. Amara*, 131 S. Ct. 1866, 1879 (2011); *Conkright*, 559 U.S. at 514-15; *Kennedy v. Plan Administrator for DuPont Sav. & Inv. Plan*, 555 U.S. 285, 294 (2009); *Metropolitan Life Ins. Co. v. Glenn*, 554 U.S. 105, 111 (2008); *Firestone*, 489 U.S. at 111-12; *Central States*, 472 U.S. at 570-71; *see also Dudenhoeffer*, 134 S. Ct. at 2472.

duty to invest trust funds prudently. *Cf.* 29 U.S.C. § 1104(a)(2) (providing that acquisition of employer stock does not violate diversification requirement of duty of prudence). Indeed, ERISA's "standard of care" was "derived from the common law of trusts." *Central States*, 472 U.S. at 570; *see also Dudenhoeffer*, 134 S. Ct. at 2465.[14] Common law trust authorities thus inform ERISA's duty of prudence as it applies here.

2. Trust law imposes a duty to examine the prudence of existing investments periodically and to remove imprudent investments

Trust law imposes two related obligations on trustees with respect to existing investments that are relevant here: (1) to reexamine the prudence of existing investments periodically, and (2) to remove imprudent investments within a reasonable time.

Under the common law, a trustee has a duty to invest prudently. *See* Restatement (Second) of Trusts § 174 (1959) ("[t]he trustee is under a duty to the beneficiary in administering the trust to exercise such care and skill as a man of ordinary prudence would exercise in dealing with his own property"). That includes an obligation to minimize investment costs. *See* Restatement (Third) of Trusts §§ 88, 90(c)(3)

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[14] *Compare* 29 U.S.C. § 1104(a)(1)(B) (imposing duty to act "with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims") *with* Restatement (Third) of Trusts § 77(1)-(2) (2007) ("The trustee has a duty to administer the trust as a prudent person would, in light of the purposes, terms, and other circumstances of the trust. . . . The duty of prudence requires the exercise of reasonable care, skill, and caution.").

& cmt. b; *see also id.* § 90 cmt. m (noting that mutual fund costs "require special attention by a trustee" and that "it is important for trustees to make careful overall cost comparisons, particularly among similar products of a specific type being considered for a trust portfolio").

The trustee's duties with respect to an investment do not cease after the trustee makes a decision to invest. To the contrary, "[t]he trustee's duties apply not only in making investments but also in monitoring and reviewing investments, which is to be done in a manner that is reasonable and appropriate to the particular investments, courses of action, and strategies involved." Restatement (Third) of Trusts § 90 cmt. b; *see also* 4 Mark L. Ascher et al., *Scott and Ascher on Trusts* § 19.4, at 1450-51 (5th ed. 2007) ("*Scott & Ascher*") ("The trustee has a continuing duty to see to it that the trust remains appropriately invested."); *Bogert's Trusts & Trustees* § 685, at 159 ("[A] trustee has a duty to continue to monitor investments regularly to ensure that they are still legal and productive."); Uniform Prudent Investor Act § 2 cmt. (1995) ("'Managing' embraces monitoring, that is, the trustee's continuing responsibility for oversight of the suitability of investments already made as well as the trustee's decisions respecting new investments."); John H. Langbein, *The Uniform Prudent Investor Act and the Future of Trust Investing*, 81 Iowa L. Rev. 641, 665 (1996) ("[i]nvestment includes not only the initial selection of securities or other assets, but also the task[] of monitoring the investments for continuing suitability").

The trustee's duty to monitor investments entails an obligation to reexamine periodically the trust portfolio to determine whether existing investments

are prudent. Although there is no precise rule for how frequently such a reexamination must occur, the leading trust law authorities make clear that the trustee has a duty, "from time to time, to examine the state of the trust's investments." 4 *Scott & Ascher* § 19.4, at 1450-51; *see Bogert's Trusts & Trustees* § 684, at 147-48 (stating that a trustee should engage in "systematic consideration of all the investments of the trust at regular intervals, for example, once every six months").[15]

As a corollary to the duty to reexamine the prudence of trust investments, trustees have a responsibility to remove imprudent investments within a reasonable time, so long as the circumstances so warrant. *See* 4 *Scott & Ascher* § 19.3.1, at 1439-40 ("When the trust estate includes assets that are inappropriate as trust investments, the trustee is ordinarily under a duty to dispose of them within a reasonable time."); *Bogert's Trusts & Trustees* § 685, at 157-58 (noting that modern prudent-investor standard "is the same as that of earlier investment standards" in the respect that, under all standards, "[o]nce an investment is determined to be imprudent . . . , the trustee must dispose of the asset within a reasonable time"); 90A C.J.S. *Trusts* § 526 ("A trustee who has made an improper investment has both the right and duty to dispose of it."). Reported decisions

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[15] The Office of the Comptroller of the Currency requires national banks that manage investments in trust to form a committee that shall, "[a]t least once during every calendar year, . . . conduct a review of all assets of each fiduciary account for which the bank has investment discretion to evaluate whether they are appropriate, individually and collectively, for the account." 12 C.F.R. § 9.6(c). A similar regulation has existed since before the enactment of ERISA. *See* 28 Fed. Reg. 3309, 3310 (Apr. 5, 1963).

applying common law trust principles recognize the obligations to review investments periodically and to remove imprudent ones.[16]

This Court recently recognized that retention of an imprudent investment can constitute a breach of ERISA's duty of prudence. *See Dudenhoeffer*, 134 S. Ct. at 2464, 2471 (declining to dismiss plaintiffs' claim that the fiduciary breached its duty of prudence by "continu[ing] to allow the Plan's investment in [company stock]" when "[a] prudent fiduciary facing similar circumstances would not have stood idly by") (internal quotation marks omitted). Lower courts likewise have recognized and applied the obligation to review investments periodically and to remove imprudent ones in the ERISA context. Thus, when a plan fiduciary "h[o]ld[s] . . . patently unsound investments," the fiduciary has violated ERISA through a "failure to invest prudently." *Fink v. National Sav. & Trust Co.*, 772 F.2d 951, 962 (D.C. Cir. 1985) (Scalia, J., concurring in part and dissenting in part) (citing *Buccino v. Continental Assurance Co.*, 578 F. Supp. 1518, 1520-23 (S.D.N.Y. 1983)); *see Buccino*, 578 F. Supp. at 1521 ("[A]s Fund fiduciaries they were under a continuing obligation to advise

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[16] *See, e.g., In re Mendleson's Will*, 261 N.Y.S.2d 525, 541 (N.Y. Surrogate's Ct., Albany Cnty. 1965) ("[I]f the prudent thing to do was sell, failure to sell was a breach of duty."); *In re Davenport's Will*, 104 N.Y.S.2d 433, 436-37 (N.Y. Surrogate's Ct., Kings Cnty. 1951) (where "[t]he slightest inquiry would have warned of the imprudence of continuing a trust investment . . . , retention of these common stocks, in the absence of an exposition of cogent reasons for so doing, is a sufficient showing of negligence"); *In re Cook's Will*, 40 A.2d 805, 809 (N.J. Prerog. Ct. 1945) (concluding that, where various circumstances "exhibited the inexpediency of retaining [an] investment," the trustee "must be surcharged for the material loss proximately occasioned by its dereliction").

the Fund to divest itself of unlawful or imprudent investments.").[17] If a fiduciary fails to review investments periodically, or performs the reviews imprudently, he has breached the duty of prudence. *See Fink*, 772 F.2d at 962 (Scalia, J., concurring in part and dissenting in part). A participant may recover for losses caused by the retention of imprudent investments as a result of a failure to review investments or an imprudent review. *See id.* at 962-63.

3. The obligation to reexamine and remove imprudent investments is not limited to situations in which "significant changes" have occurred

The lower courts' limitation of the obligation to reexamine investments and remove imprudent ones to situations in which "significant changes in conditions" have occurred, App. 19, 144, is unsupported by authority and unworkable in practice.

a. Leading trust authorities establish a general duty to monitor existing investments[18] and remove

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[17] *See also Martin v. Consultants & Administrators, Inc.*, 966 F.2d 1078, 1087-88 (7th Cir. 1992) (noting "the continuing nature of a trustee's duty under ERISA to review plan investments and eliminate imprudent ones"); *Morrissey v. Curran*, 567 F.2d 546, 549 n.9 (2d Cir. 1977) ("The trustee's obligation to dispose of improper investments within a reasonable time is well established at common law. ERISA can hardly be read to eviscerate this duty . . . .") (citation omitted); *Howell v. Motorola, Inc.*, 633 F.3d 552, 567 (7th Cir. 2011) ("the selection of plan investment options *and the decision to continue offering a particular investment vehicle* are acts to which fiduciary duties attach") (emphasis added).

[18] *See, e.g., Bogert's Trusts & Trustees* § 684, at 145 ("A trustee also owes the beneficiary the duty of examining and checking the trust investments periodically throughout the life of the trusteeship."); Restatement (Third) of Trusts § 92 cmt. a

imprudent investments[19] that need not be triggered by any change, let alone a significant change, in circumstances. Although fiduciaries do have an obligation to remove imprudent investments that become inappropriate as a result of changed circumstances, *see* 4 *Scott & Ascher* § 19.4, at 1450-51, that responsibility is an aspect of, rather than the entirety of, the fiduciary's duty to review investments periodically and remove imprudent ones. "The duty to review trust investments should be performed by the collection of information currently as changes occur, *and also by a systematic consideration of all the investments of the trust at regular intervals*, for example, once every six months." *Bogert's Trusts & Trustees* § 684, at 147-48 (emphasis added). Thus, a fiduciary may satisfy the duty to reexamine investments periodically by performing a systematic review each January. Yet, if market developments rendered some of the investments imprudent in March, the fiduciary may have a duty to remove the investments sooner than the systematic review the following January. But that obligation to respond to changed circumstances in no way obviates the additional obligation to review the entire portfolio periodically.

The decision in *In re Stark's Estate*, 15 N.Y.S. 729 (N.Y. Surrogate's Ct., Rensselaer Cnty. 1891), illustrates a trust fiduciary's responsibility to monitor and remove imprudent investments even in the

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(describing the duty articulated in § 90 cmt. b as a "general, ongoing duty to monitor investments").

[19] *See, e.g.*, *Bogert's Trusts & Trustees* § 685, at 157-58 ("Once an investment is determined to be imprudent . . . , the trustee must dispose of the asset within a reasonable time."); 90A C.J.S. *Trusts* § 526 ("A trustee who has made an improper investment has both the right and duty to dispose of it.").

absence of changes in circumstances.[20] There, the "principal question" concerned "the propriety" of the trustee's "investment of . . . trust funds" in a particular mortgage and, "*also*, whether the trustee exercised a reasonable degree of diligence *in looking after the security after the investment had been made.*" *Id.* at 731 (emphases added). The court explained that "[i]t is not by a prudent investment alone that a trustee performs his whole duty in regard to a trust fund." *Id.* Rather, the trustee "is still bound to be watchful . . . and take notice of all those things affecting the investment which a man of fair judgment, care, and prudence would take and keep in consideration in the matter of a loan of his own moneys." *Id.* The court concluded that the trustee breached his fiduciary duty in two ways: "*First*, in making the original investment of the fund; and, *second*, in the failure to use such proper care, watchfulness, and oversight, and the adoption of such prompt means to prevent loss to the estate after the investment had been made, as men in general of ordinary intelligence and prudence in such matters exercise in their own affairs." *Id.* at 732.

In *Stark's Estate*, the breach by the trustee's failure to "be watchful" in monitoring the investment did not arise out of any change in circumstances. When the initial investment was made, the property securing the mortgage was "depreciating in value year by year," and the interest was already "in arrears." *Id.* at 731-32. By permitting those circumstances to

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[20] Bogert's treatise cites *Stark's Estate* as authority for the proposition that "[a] trustee also owes the beneficiary the duty of examining and checking the trust investments periodically throughout the life of the trusteeship." *Bogert's Trusts & Trustees* § 684, at 145.

persist, to the detriment of the trust, the trustee breached his duty to exercise "a reasonable degree of diligence in looking after the security after the investment had been made." *Id.* at 731; *see id.* at 732 ("[T]he trustee, knowing when he made the investment that interest was in arrear, and real estate depreciating, was called upon in the discharge of his duty to be watchful, and, if a mistake had been made in making the investment, to see that the estate suffered as little loss as possible through his error of judgment.").

In attempting to reconcile the lower court's "changed circumstances" approach with the common law, respondents have argued that, under the Second Restatement, "the duty to divest arises when 'owing to a subsequent *change of circumstances* the investment is no longer a proper investment.'" Resp. Supp. Cert. Br. 4 (quoting Restatement (Second) of Trusts § 231 cmt. a) (emphasis added by respondents). But the portion of the Second Restatement on which respondents rely concerned circumstances in which the investment originally "was a proper investment." Restatement (Second) of Trusts § 231 cmt. a. Nothing in the Second Restatement endorsed respondents' and the lower courts' view that, when an investment is improper from the start, the fiduciary has no further duty with respect to that investment unless the beneficiary proves a significant change in circumstances. Other trust law sources confirm the duty to monitor investments and remove imprudent ones is not limited to changed circumstances, as *Stark's Estate* illustrates. *See Bogert's Trusts & Trustees* § 684, at 145, 147-48; 4 *Scott & Ascher* § 19.4, at 1450-51.

b. The contention that a trustee need only reexamine an investment when it has undergone

significant changes also conflicts with the principle that the prudence of investments must be evaluated both individually and in the context of the portfolio as a whole. *See* Restatement (Third) of Trusts § 90(a); Uniform Prudent Investor Act § 2(b). ERISA's fiduciary responsibility provision incorporates that standard by regulation. *See* 29 C.F.R. § 2550.404a-1(b)(1)(i) (stating that relevant circumstances in evaluating an investment include "the role the investment or investment course of action plays in that portion of the plan's investment portfolio with respect to which the fiduciary has investment duties"). The Department of Labor accordingly has recognized that "the prudence of an investment decision should not be judged without regard to the role that the proposed investment or investment course of action plays within the overall plan portfolio." 44 Fed. Reg. 37,221, 37,222 (June 26, 1979) (promulgating 29 C.F.R. § 2550.404a-1).

The standard advocated by the courts below is unfaithful to that administrative guidance. In conditioning the duty to reexamine an investment on whether that particular investment has undergone "significant changes," the Ninth Circuit's standard ignores the fiduciary's responsibility to consider the prudence of the plan's investment lineup as a whole. To be sure, some investments (such as retail-class shares of a mutual fund that offers institutional-class shares providing the same investment with lower fees) are imprudent in any portfolio. But, in other situations, it is necessary to examine the entire portfolio to determine whether an investment is prudent. An investment may be imprudent for reasons unrelated to any changes in that particular

investment.[21] Thus, a review of plan investments artificially limited to those investments that have experienced "significant changes" is insufficient to assess the prudence of an ERISA plan's investment lineup.

c. Such a limitation would also prove unworkable for plan fiduciaries and courts alike. In determining whether a fiduciary had breached a duty by failing to remove an imprudent investment, courts would first need to determine whether changes to the investment were "significant," adding a subjective and unnecessary step to the inquiry. The standard would also be difficult for fiduciaries to apply. A fiduciary would need to engage in two tiers of review: first, to examine the entire portfolio to determine whether each investment had undergone "significant changes"; and, second, to engage in a "full due diligence review" of those investments. App. 19, 127. Such a regime would shift much of the fiduciary's efforts away from reviewing the prudence of investments and toward the superfluous task of determining whether investments had experienced "significant changes." The lower courts' approach would therefore erode ERISA's protections for plan participants while complicating fiduciaries' efforts to comply with the statute.

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[21] For example, a plan's investments in risky high-yield bonds may be prudent in the context of an overall bond portfolio that consists mostly of investment grade municipal bonds. Yet, if a fiscal crisis causes the municipal bonds to become riskier, it may no longer be prudent to hold the high-yield bonds, even though nothing has changed with respect to those particular investments.

B. Under § 1113(1), Each Breach Of The Obligation To Review Investments And Remove Imprudent Ones Begins A New Limitations Period For That Breach

1. Each breach of a fiduciary's obligation to review investments periodically and remove imprudent ones starts the running of a new limitations period for claims arising out of that breach. Section 1113(1) permits the filing of a claim within six years of either "(A) the date of the last action which constituted a part of the breach or violation, or (B) in the case of an omission the latest date on which the fiduciary could have cured the breach or violation." 29 U.S.C. § 1113(1). If the fiduciary takes an "action which constitute[s]" a breach, or part of a breach, the plaintiff may bring suit within six years of such action. *Id.* § 1113(1)(A). If the fiduciary fails to take a required action and therefore breaches her duties by omission, the plaintiff may bring suit within six years of any "date on which the fiduciary could have cured the breach or violation." *Id.* § 1113(1)(B). Section 1113(1) functionally creates a six-year lookback provision permitting a plan participant to recover for breaches occurring within the six years prior to suit.

This Court has recognized that a plaintiff may recover for violations occurring within a limitations period, even if those violations relate to other violations occurring prior to the limitations period for which the plaintiff could no longer bring a claim. In *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 134 S. Ct. 1962 (2014), for example, the Court held with respect to the three-year copyright limitations provision that, "when a defendant commits successive violations, the statute of limitations runs separately from each violation. Each time an infringing work is reproduced or

distributed, the infringer commits a new wrong. Each wrong gives rise to a discrete 'claim' that 'accrue[s]' at the time the wrong occurs. In short, each infringing act starts a new limitations period." *Id.* at 1969 (quoting 17 U.S.C. § 507(b)) (alteration in original, footnote omitted). The plaintiff in *Petrella* brought a copyright infringement lawsuit in 2009 alleging that a film that debuted in 1980 infringed on a copyright dating from 1963. *Id.* at 1970-71. The Court held that the plaintiff could obtain relief for acts of infringement occurring within the three years preceding the lawsuit, even though those acts involved the distribution of a film produced nearly three decades earlier. *Id.* at 1978-79.[22]

Similarly, a plaintiff may recover for omissions within the limitations period that relate to an original violation outside the limitations period. In *Bay Area Laundry & Dry Cleaning Pension Trust Fund v. Ferbar Corp. of California*, 522 U.S. 192 (1997), an employer had withdrawn from a multiemployer pension plan, yet failed to make withdrawal liability payments required by the Multiemployer Pension Plan Amendments Act of 1980, an amendment to ERISA. *Id.* at 198. The initial missed withdrawal payment occurred outside the limitations period, but

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[22] *See also Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 338 (1971) (in antitrust context, "each time a plaintiff is injured by an act of the defendants a cause of action accrues to him to recover the damages caused by that act"); *State Farm Mut. Auto. Ins. Co. v. Ammann*, 828 F.2d 4, 5 (9th Cir. 1987) (Kennedy, J., concurring) (same); *Turley v. Rednour*, 729 F.3d 645, 654 (7th Cir. 2013) (Easterbrook, C.J., concurring) ("Violations begin and continue, and the prevailing rule treats new acts, or ongoing inaction, as new violations. . . . The period of limitations runs from each independently unlawful act or failure to act.").

the employer also missed subsequent payments within the limitations period. *Id.* at 206. Even though claims arising out of the original missed payment were untimely, the plan could pursue claims for each missed payment within the limitations period because "'a new cause of action,' carrying its own limitations period, 'arises from the date each payment is missed.'" *Id.* at 208 (quoting *Board of Trustees of Dist. No. 15 Machinists' Pension Fund v. Kahle Eng'g Corp.*, 43 F.3d 852, 857 (3d Cir. 1994)).

This case is unlike those in which the plaintiff bases a claim on an unlawful act that "occurred prior to the [limitations] period" but that has "continuing effects during that period." *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618, 625 (2007). In the employment-discrimination context, this Court has rejected arguments that the "continuing effects" of "precharging period discrimination" constitute "a present violation." *Id.*[23] Thus, for example, when a professor alleges that his college denied him tenure based on his nationality, the time for filing a claim runs from the date on which tenure was denied, not from the later date on which the professor ceases to be employed by the school, because the ending of the professor's employment was an "effect" of the discriminatory denial of tenure. *See id.* at 626 (discussing *Delaware State College v. Ricks*, 449 U.S. 250 (1980)). Here, petitioners do not base their claim on the March 1999 decision to provide retail-class

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[23] Congress later amended Title VII to state that "an unlawful employment practice occurs . . . when an individual is affected by application of a discriminatory compensation decision or other practice, including each time wages, benefits, or other compensation is paid, resulting in whole or in part from such a decision or other practice." 42 U.S.C. § 2000e-5(e)(3)(A).

shares of the three funds at issue. Instead, the "breach[es] or violation[s]," 29 U.S.C. § 1113(1), underlying petitioners' claims are respondents' failures prudently to review and remove retail-class shares within the limitations period. Even in the employment context, *Ledbetter* expressly recognized that such claims are timely, explaining that, "of course, if an employer engages in a series of acts each of which is intentionally discriminatory, then a fresh violation takes place when each act is committed." 550 U.S. at 628 (citing *National R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 113 (2002)); *see id.* at 636 ("[A] freestanding violation may always be charged within its own charging period regardless of its connection to other violations."); *Morgan*, 536 U.S. at 113 ("The existence of past acts and the employee's prior knowledge of their occurrence ... does not bar employees from filing charges about related discrete acts so long as the acts are independently discriminatory and charges addressing those acts are themselves timely filed."); *Lewis*, 560 U.S. at 214 (cases such as *Ricks* "establish only that a Title VII plaintiff must show a 'present violation' within the limitations period").

2. Section 1113(1)'s text removes any doubt that petitioners may recover for breaches or violations occurring after imprudent funds are initially added to the plan. Whereas *Petrella* and *Bay Area Laundry* involved generically worded limitations provisions,[24] § 1113(1) specifies precisely when the limitations

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[24] *See* 17 U.S.C. § 507(b) ("No civil action shall be maintained under the provisions of this title unless it is commenced within three years after the claim accrued."); 29 U.S.C. § 1451(f)(1) ("An action under this section may not be brought after ... 6 years after the date on which the cause of action arose ....").

clock begins to run. For breaches in the form of actions, the clock begins to run at "the date of the *last action* which constituted a *part of* the breach or violation." *Id.* § 1113(1)(A) (emphases added). Each wrongful action within the limitations period gives rise to a timely claim, whether classified as an entirely separate breach or as part of a breach that began before the limitations period. Under no plausible reading of § 1113(1)(A) could the *first* wrongful action – in this case the addition of the funds in 1999 – start the limitations clock on subsequent breaches or violations.

Likewise, where a defendant breaches its fiduciary duties by omission in failing to take a required action, the statute specifies that the limitations clock begins to run on "the *latest date* on which the fiduciary could have cured the breach or violation." *Id.* § 1113(1)(B) (emphasis added). Under that provision, it is immaterial that a prior breach occurred before the limitations period or that the defendant had an initial opportunity to cure the breach before the limitations period, because the six-year period runs from the "latest date," not the first date, that the fiduciary could have cured the violation.[25]

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[25] Respondents incorrectly suggest that petitioners' and the United States' position requires holding that "*any* failure to correct *any* earlier imprudent act could be reframed as a claim that the fiduciary 'omitted' to 'cure' the violation." Supp. Cert. Opp. 5. Petitioners' claim rests not on a failure to cure past violations, but on new breaches of the fiduciary obligation under ERISA's duty of prudence to monitor investments and remove imprudent ones within a reasonable time. In this particular circumstance, that fiduciary duty required respondents to remove imprudent investments previously selected.

C. Petitioners Presented Evidence Of Breaches Within The Limitations Period

The record evidence demonstrates respondents' failure prudently to review and remove retail-class mutual funds within the six years preceding commencement of this action in August 2007. The three funds at issue – the Janus fund, the Allianz fund, and the Franklin fund – offered two share classes, retail and institutional. App. 14, 68. The two share classes were identical in all material respects, except that the retail-class shares were significantly more expensive for plan participants. App. 61, 83-84, 128-29. Throughout the six years preceding the filing of the complaint, respondents provided as plan investments the more expensive retail-class shares. App. 68.[26]

To defeat summary judgment, petitioners need only show that a genuine issue of material fact exists as to whether respondents breached their duty of prudence. The lower courts' findings and conclusions demonstrate that petitioners easily surmounted that threshold. For the funds added in 2002, the lower courts properly concluded that respondents breached the duty of prudence by providing retail-class shares when less expensive institutional-class shares were available. As the Ninth Circuit explained, "an experienced investor would have reviewed all available share classes and the relative costs of each when selecting a mutual fund." App. 63. Yet there was no "evidence that Edison considered the possibility of institutional classes for the funds litigated." App. 63-64. Moreover, as the district court found after a

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[26] The three funds at issue were first included as plan investments in March 1999, and they remained in the plan through the filing of the complaint. App. 92-98.

bench trial, no prudent fiduciary who had considered institutional-class shares would have invested instead in retail-class shares: "In light of the fact that the institutional share classes offered the exact same investment at a lower fee, a prudent fiduciary acting in a like capacity would have invested in the institutional share classes." App. 142.

Within the six-year limitations period, respondents breached their duty prudently to review and remove the retail-class shares of the funds added in March 1999. As plan fiduciaries, respondent had "a continuing duty to see to it that the trust remain[ed] appropriately invested," 4 *Scott & Ascher* § 19.4, at 1450-51, and "a duty to dispose of" imprudent investments "within a reasonable time," *id.* § 19.3.1, at 1439-40. *See supra* pp. 24-28. During the limitations period, respondents periodically monitored the plan investments. *See supra* pp. 9-10. There is no evidence, however, that they gave any, let alone appropriate, consideration to switching to the institutional classes of those three funds.[27] Thus, the consideration of institutional classes that the lower courts found lacking as to the three funds added in July 2002 was

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[27] For the Franklin Small-Mid Cap Growth Fund added in March 1999, respondents offered an explanation for selecting the retail-class shares: unlike the institutional-class shares, the retail-class shares "had a Morningstar rating and significant performance history." App. 96. Yet, given that the institutional-class shares offered the same investment at a lower fee, and that respondents retained the retail-class shares even after the institutional-class shares developed a significant performance history, petitioners at least raised a genuine issue of material fact as to whether respondents acted imprudently in retaining the retail-class shares throughout the limitations period.

equally absent throughout the limitations period for the three funds added in March 1999.[28]

Respondents' failures prudently to review and remove the retail-class shares within the six-year limitations period gave rise to timely causes of action under ERISA. That is true whether those failures are viewed as breaches by action (imprudent periodic reviews, resulting in the retention of imprudent investments) or by omission (imprudent failures to consider institutional classes during periodic reviews and failures to remove imprudent investments in retail classes). If viewed as breaches by action, respondents breached their duty of prudence by conducting imprudent reviews during each quarterly meeting of the investment committees at which they reviewed plan investments but neither considered nor switched to institutional-class shares for the three funds at issue. If viewed as breaches by omission, respondents breached their duty of prudence by failing to monitor properly the investment options on a periodic basis and to remove the imprudent retail classes. Under both clause (A) and clause (B) of § 1113(1), respondents committed multiple "breach[es] or violation[s]" of ERISA during the six years preceding the filing of the complaint. Because the statute provides that unlawful actions and omissions each start the running of a new limitations

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[28] The Court need not decide the precise scope of an ERISA fiduciary's obligation to review plan investments and remove imprudent ones. The specific actions required by the duty of prudence may vary according to factual circumstances. To reverse the holding below, it is sufficient to conclude that petitioners have raised a genuine issue of material fact that, by failing to consider the availability of lower-cost institutional-class shares and failing to remove the higher-cost retail-class shares for six years, respondents breached their duty of prudence.

period, it is unnecessary here for the Court to decide the precise dividing line between actions and omissions.

Then-Judge Scalia's opinion in *Fink* illustrates that the retention of imprudent investments within ERISA's limitations period gives rise to timely claims for losses attributable to that retention. In *Fink*, the plaintiffs alleged that a plan trustee acquired imprudent investments between three years and six years before the lawsuit's filing. *See* 772 F.2d at 956-58. The court held that the plaintiffs lacked sufficient knowledge to trigger ERISA's three-year limitations provision in § 1113(2) and that claims arising out of the acquisition of the investments were timely under the six-year period of § 1113(1). *See id.* at 957-58. In an opinion concurring in part and dissenting in part, Judge Scalia disagreed with the panel majority's conclusion that the plaintiffs lacked actual knowledge of the imprudent acquisition of the investments more than three years before bringing suit; he therefore would have held that the claims arising out of the original acquisition were time-barred under § 1113(2). *Id.* at 962 (Scalia, J., concurring in part and dissenting in part). He distinguished, however, between the initial acquisition of the investments and the "alleged failure to invest prudently during the [limitations] period." *Id.* at 962-63. Judge Scalia noted that "a trustee who has made (*or held*) patently unsound investments" has violated ERISA. *Id.* at 962 (emphasis added). He therefore concluded that the plaintiffs were entitled to relief for harm "attributable to action [the defendants] took or failed to take during th[e] [limitations] period." *Id.* at 963. Under that view, as under the common law, retention of imprudent investments through action or omission gives rise to a timely claim for relief.

II. THE NINTH CIRCUIT'S REASONS FOR AFFIRMING SUMMARY JUDGMENT WERE ERRONEOUS

The Ninth Circuit erroneously held that the initial inclusion of the retail-class shares started the limitations period on all of petitioners' claims. That conclusion misconstrued petitioners' arguments, failed to consider the full scope of respondents' fiduciary duties, and reflected several legal errors.

First, the Ninth Circuit's analysis failed to address petitioners' claim of breaches within the limitations period, after the addition of the imprudent share classes. The Ninth Circuit characterized petitioners' claim as based on "the act of designating an investment for inclusion" and "the mere continued offering of a plan option, without more." App. 17, 18. That simplistic presentation mischaracterized petitioners' claim. Petitioners contend that respondents breached their obligation to review the prudence of existing investments and remove imprudent ones. "The real question . . . is not whether a claim predicated on that conduct is *timely*, but whether the practice thus defined can be the basis for a [fiduciary-breach] claim *at all*." *Lewis*, 560 U.S. at 211. ERISA's duty of prudence, informed by trust law, requires periodic review of existing investments and prompt removal of imprudent ones. Here, petitioners have demonstrated that respondents breached those obligations within the six years preceding the filing of the complaint, giving rise to actionable claims within the limitations period.

The Ninth Circuit's error in conceptualizing petitioners' claim led it to use an incorrect legal framework to analyze the application of the limitations provision. The court viewed petitioners' sole

argument for timeliness as an effort to apply a "continuing violation theory," which would allow petitioners to recover for the addition of the retail-class shares that occurred outside the limitations period. App. 17 (internal quotation marks omitted). But petitioners brought claims of new violations of the fiduciary obligations to reexamine the prudence of investments periodically and to remove imprudent investments (and petitioners did not seek to recover losses incurred more than six years before the suit). Those new violations, distinct from the initial act of adding the retail-class shares (for which petitioners do not seek to recover), began new limitations periods under which petitioners' claims are timely.[29]

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[29] The Ninth Circuit erroneously relied on its prior decision in *Phillips v. Alaska Hotel & Restaurant Employees Pension Fund*, 944 F.2d 509 (9th Cir. 1991). App. 17-18. That case involved a challenge to restrictive vesting rules for benefits under a traditional pension plan (known as a "defined-benefit plan"). *See LaRue v. DeWolff, Boberg & Assocs., Inc.*, 552 U.S. 248, 255 (2008) (distinguishing a defined-benefit plan from a defined-contribution plan, such as the plan at issue here). The challenged vesting rules in *Phillips* had been in place for nearly 10 years before the plaintiffs filed suit. *See* 944 F.2d at 512; *id.* at 522 (O'Scannlain, J., concurring). The Ninth Circuit reasoned that, even if the trustees' repeated failures to relax the vesting rules could be considered "a series of discrete but related breaches," the action was barred by § 1113(2), which runs from "the earliest date on which the plaintiff had actual knowledge of the breach or violation." *See id.* at 520-21. According to the Ninth Circuit, when a plaintiff challenges "[a] continuous series of breaches . . . of the same kind and nature," "actual knowledge of [any] one of [those breaches] more than three years before commencing suit" bars the claim under § 1113(2). *Id.* at 521. But, whereas § 1113(2) runs from "the *earliest* date" on which the plaintiff had knowledge, § 1113(1) runs from "the date of the *last* action" or "the *latest* date" on which a breach could have been cured. 29 U.S.C. § 1113 (emphases added). Accordingly, even if the *Phillips* court were

Second, the Ninth Circuit further erred in expressing concern that allowing claims relating to the continued offering of imprudent investments could "expose present Plan fiduciaries to liability for decisions made by their predecessors – decisions which may have been made decades before and as to which institutional memory may no longer exist." App. 18 (internal quotation marks omitted). A claim based on the failure properly to monitor and remove imprudent investments within the six years preceding the filing of the complaint does not premise liability on the initial decision to include an investment outside of the limitations period. Moreover, the statute itself addresses the court of appeals' concern by providing that "[n]o fiduciary shall be liable with respect to a breach of fiduciary duty . . . if such breach was committed before he became a fiduciary or after he ceased to be a fiduciary." 29 U.S.C. § 1109(b).

For petitioners' claims, and more generally for claims based on retaining imprudent investments, the imprudence of the original investment decision is immaterial. The crucial question is the imprudence of the investment during the limitations period, for

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correct that knowledge of the first breach in a series triggers the running of § 1113(2) as to all of the breaches (and that proposition is doubtful), there is no plausible interpretation of § 1113(1) that would bar all claims as to a series of breaches simply because the first breach occurred more than six years before the action was commenced. Moreover, as Judge O'Scannlain explained in his concurring opinion in *Phillips*, the challenged conduct in that case was not best understood as a series of discrete breaches. *See* 944 F.2d at 522-23 (O'Scannlain, J., concurring). There, unlike here, the participants identified no ongoing fiduciary obligation to reexamine and remove the challenged vesting rules. Thus, according to Judge O'Scannlain, the plaintiffs in *Phillips* had "confused the failure to *remedy* the alleged breach of an obligation with the commission of an alleged *second* breach." *Id.* at 523.

which memories will be fresh. For example, if a plaintiff brought a lawsuit in 2015 based on an investment that was imprudent when added in 1980, but had become prudent before 2009, the plaintiff would have no claim.[30] Conversely, if the investment was prudent when added in 1980, but had become imprudent and remained imprudent within the limitations period, the plaintiff would have a claim based on failure to remove the investment. *See Dudenhoeffer*, 134 S. Ct. at 2464, 2471-72; *Fink*, 772 F.2d at 962-63 (Scalia, J., concurring in part and dissenting in part). In either case, the claim would turn on the prudence of the investment during the limitations period, not on the prudence of the initial decision to add the investment outside the limitations period.[31]

Third, the Ninth Circuit erroneously ignored petitioners' argument that their claims were timely under the "omission" prong of § 1113(1)(B). In rejecting petitioners' argument based on the "last action" prong of § 1113(1)(A), the Ninth Circuit "observe[d]

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[30] *See* III Austin W. Scott, *The Law of Trusts* § 230.5, at 1880 (3d ed. 1967) ("[w]here a trustee makes an investment which at the time when he makes it is not a proper trust investment, but which subsequently becomes a proper trust investment, and no loss has been incurred in the meantime, the trustee is not subject to liability").

[31] In all events, the supposition that events from long ago may prove relevant to claims for recent breaches does not justify dismissing claims that are timely under § 1113. *Cf. Morgan*, 536 U.S. at 113 ("Nor does the statute bar an employee from using the prior acts as background evidence in support of a timely claim."); *Lewis*, 560 U.S. at 216-17 (rejecting argument that allowing disparate-impact claim arising out of application of policy developed long ago would "result in a host of practical problems" because the Court's "charge is to give effect to the law Congress enacted").

that in the case of omissions the statute already embodies what the beneficiaries urge for the last action" by tying "the limitations period to 'the latest date on which the fiduciary could have cured the breach or violation.'" App. 18 (quoting 29 U.S.C. § 1113(1)(B)). That observation should have led the Ninth Circuit to conclude that petitioners presented timely claims that respondents violated their fiduciary duty by omission in failing to carry out the required action of removing the imprudent investments. Yet, without explanation, the Ninth Circuit failed to consider whether the omissions prong applied.[32]

Fourth, the Ninth Circuit erred in concluding that any fiduciary duty to reexamine and remove invest-

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[32] Petitioners presented that argument in their opening appellate brief, and respondents' assertion that petitioners "argued the issue in only one half of one sentence," Cert. Opp. 13 n.4, is incorrect. *See* First Brief on Cross-Appeal at 16 (Apr. 20, 2011) ("At any time in that six-year period Defendants could have switched from retail to institutional class shares. Their failure to do so caused the Plan to pay unnecessary, retail fees in each of those six years. Therefore, . . . the 'latest date on which the fiduciary could have cured the breach' – replacing retail with institutional shares – . . . occurred within six years.") (quoting 29 U.S.C. § 1113(1)(B)). Further, petitioners elaborated on the argument in their reply brief. *See* Third Brief on Cross-Appeal at 29-30 (Oct. 6, 2011) ("Since Defendants never actually decided that retail shares were more prudent than institutional shares for Plan mutual funds, their breach also is one of omission. . . . It was a breach of omission in the sense that Defendants failed even to consider the institutional share class alternatives that provided the exact same investments at a lower cost. Defendants could have cured that omission at any time after the initial selection of the funds within six years preceding Plaintiffs' complaint. Since Defendants 'could have cured the breach or violation' that resulted from their 'omission' within that six-year period, Plaintiffs' claims were timely even as to investments included in the Plan before August 16, 2001.").

ments is limited to situations in which "significant changes in conditions . . . should have prompted a full due diligence review." App. 19 (internal quotation marks omitted). The Ninth Circuit offered no authority for that limitation, and no such limitation exists. *See supra* pp. 28-33. Rather, a fiduciary's review of investments "currently as changes occur" must be accompanied "also by a systematic consideration of all the investments of the trust at regular intervals." *Bogert's Trusts & Trustees* § 684, at 147-48. No prudent fiduciary would "review[] all available share classes and the relative costs of each" only once, "when *selecting* a mutual fund," instead of throughout the time that fiduciary maintains that mutual fund in the plan. *Cf.* App. 63 (emphasis added).[33]

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[33] In *Fuller v. SunTrust Banks, Inc.*, 744 F.3d 685 (11th Cir. 2014), on which respondents relied in their supplemental brief in opposition, the court concluded that a claim based on imprudent retention of plan funds was based on "simply a failure to remedy the initial breach" because there were no "allegations that would distinguish the two types of claims." *Id.* at 701-02. But the *Fuller* court failed to recognize that a claim based on imprudently adding an investment depends on the fiduciary's prudence at the time of addition, whereas a claim based on an investment's imprudent retention depends on the fiduciary's prudence at the time of retention.

David v. Alphin, 704 F.3d 327 (4th Cir. 2013), on which respondents have also relied, is unpersuasive because it purported not even to "decide whether ERISA fiduciaries have an ongoing duty to remove imprudent investment options in the absence of a material change in circumstances." *Id.* at 341.

III. AN ATEXTUAL RULE BARRING CLAIMS RELATING TO INVESTMENTS FIRST ADDED OUTSIDE THE LIMITATIONS PERIOD WOULD HINDER ERISA'S PURPOSES

A rule permitting ERISA fiduciaries to maintain imprudent plan investments so long as those investments were first selected more than six years ago finds no support in ERISA's text or the common law trust authorities that underlie ERISA's fiduciary duties. This Court should reject the court of appeals' rule on that basis alone. The Ninth Circuit's rule also frustrates ERISA's broad remedial purpose to protect participants in employee benefit plans from mismanagement of plan assets.

A. Congress Enacted ERISA To Safeguard The Management Of Employee Benefit Funds And Provide Remedies For Imprudent Management

Congress enacted ERISA "to safeguard employees from the abuse and mismanagement of funds that had been accumulated to finance various types of employee benefits." *Massachusetts v. Morash*, 490 U.S. 107, 112 (1989). Those abuses included "'self-dealing, *imprudent investing*, and misappropriation of plan funds.'" *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 15 (1987) (quoting 120 Cong. Rec. 29,932 (1974)) (emphasis added). Congress found that there existed a "lack of . . . adequate safeguards concerning [employee benefit plans'] operation." 29 U.S.C. § 1001(a). In enacting ERISA "following almost a decade of studying the Nation's private pension plans," *Nachman Corp. v. PBGC*, 446 U.S. 359, 361 (1980), Congress sought both to protect plan beneficiaries from mismanagement of benefit plans and to provide robust remedies:

> It is hereby declared to be the policy of this chapter to protect . . . the interests of participants in employee benefit plans and their beneficiaries, . . . by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts.

29 U.S.C. § 1001(b); *see also Firestone*, 489 U.S. at 108 ("ERISA provides 'a panoply of remedial devices' for participants and beneficiaries of benefit plans.") (quoting *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 146 (1985)).

B. The Ninth Circuit's Rule Deprives New Beneficiaries Of Protection Against Long-standing Imprudent Investments

Under the Ninth Circuit's rule, if plan fiduciaries provide an imprudent investment option for more than six years, that investment is immune from scrutiny so long as no "significant changes" with respect to the investment have occurred. Thus, if a plan had maintained a menu of imprudent investment options from 2008 through 2014, a participant who joins the plan in 2015 would have no recourse to challenge those imprudent investments, even if she filed suit promptly on the day she joined the plan.

That concern is not merely academic; the lower courts denied relief to new plan participants in this very case. The class that petitioners represented included new members of the plan.[34] And, if affirmed,

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[34] *See* App. 66 (certified class defined as: "All persons, excluding the Defendants . . . , who were or are participants or beneficiaries of the Plan and who were, are, or may have been affected by the conduct set forth in the Second Amended Complaint.").

the judgment below would have preclusive effect against all class members. *See Taylor v. Sturgell*, 553 U.S. 880, 894 (2008). Yet the lower courts denied all relief, even declining to order the removal of the Allianz retail-class fund, which was added in 1999 and remained in the plan as of the district court's post-trial decision. That anomalous result finds no support in ERISA's text, and it contradicts Congress's purpose of providing "ready access to the Federal courts" "to protect . . . the interests of participants in employee benefit plans and their beneficiaries," 29 U.S.C. § 1001(b).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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STATUTORY ADDENDUM

1. Section 404 of the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1104, provides:

§ 1104. Fiduciary duties

(a) Prudent man standard of care

(1) Subject to sections 1103(c) and (d), 1342, and 1344 of this title, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and –

(A) for the exclusive purpose of:

(i) providing benefits to participants and their beneficiaries; and

(ii) defraying reasonable expenses of administering the plan;

(B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;

(C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and

(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this subchapter and subchapter III of this chapter.

(2) In the case of an eligible individual account plan (as defined in section 1107(d)(3) of this title), the diversification requirement of paragraph (1)(C) and the prudence requirement (only to the extent that it requires diversification) of paragraph (1)(B) is

not violated by acquisition or holding of qualifying employer real property or qualifying employer securities (as defined in section 1107(d)(4) and (5) of this title).

(b) Indicia of ownership of assets outside jurisdiction of district courts

Except as authorized by the Secretary by regulations, no fiduciary may maintain the indicia of ownership of any assets of a plan outside the jurisdiction of the district courts of the United States.

(c) Control over assets by participant or beneficiary

(1)(A) In the case of a pension plan which provides for individual accounts and permits a participant or beneficiary to exercise control over the assets in his account, if a participant or beneficiary exercises control over the assets in his account (as determined under regulations of the Secretary) –

(i) such participant or beneficiary shall not be deemed to be a fiduciary by reason of such exercise, and

(ii) no person who is otherwise a fiduciary shall be liable under this part for any loss, or by reason of any breach, which results from such participant's or beneficiary's exercise of control, except that this clause shall not apply in connection with such participant or beneficiary for any blackout period during which the ability of such participant or beneficiary to direct the investment of the assets in his or her account is suspended by a plan sponsor or fiduciary.

(B) If a person referred to in subparagraph (A)(ii) meets the requirements of this subchapter in connection with authorizing and implementing the blackout

period, any person who is otherwise a fiduciary shall not be liable under this subchapter for any loss occurring during such period.

(C) For purposes of this paragraph, the term "blackout period" has the meaning given such term by section 1021(i)(7) of this title.

(2) In the case of a simple retirement account established pursuant to a qualified salary reduction arrangement under section 408(p) of title 26, a participant or beneficiary shall, for purposes of paragraph (1), be treated as exercising control over the assets in the account upon the earliest of –

(A) an affirmative election among investment options with respect to the initial investment of any contribution,

(B) a rollover to any other simple retirement account or individual retirement plan, or

(C) one year after the simple retirement account is established.

No reports, other than those required under section 1021(g) of this title, shall be required with respect to a simple retirement account established pursuant to such a qualified salary reduction arrangement.

(3) In the case of a pension plan which makes a transfer to an individual retirement account or annuity of a designated trustee or issuer under section 401(a)(31)(B) of title 26, the participant or beneficiary shall, for purposes of paragraph (1), be treated as exercising control over the assets in the account or annuity upon-

(A) the earlier of –

(i) a rollover of all or a portion of the amount to another individual retirement account or annuity; or

(ii) one year after the transfer is made; or

(B) a transfer that is made in a manner consistent with guidance provided by the Secretary.

(4)(A) In any case in which a qualified change in investment options occurs in connection with an individual account plan, a participant or beneficiary shall not be treated for purposes of paragraph (1) as not exercising control over the assets in his account in connection with such change if the requirements of subparagraph (C) are met in connection with such change.

(B) For purposes of subparagraph (A), the term "qualified change in investment options" means, in connection with an individual account plan, a change in the investment options offered to the participant or beneficiary under the terms of the plan, under which –

(i) the account of the participant or beneficiary is reallocated among one or more remaining or new investment options which are offered in lieu of one or more investment options offered immediately prior to the effective date of the change, and

(ii) the stated characteristics of the remaining or new investment options provided under clause (i), including characteristics relating to risk and rate of return, are, as of immediately after the change, reasonably similar to those of the existing investment options as of immediately before the change.

(C) The requirements of this subparagraph are met in connection with a qualified change in investment options if –

(i) at least 30 days and no more than 60 days prior to the effective date of the change, the plan administrator furnishes written notice of the change

to the participants and beneficiaries, including information comparing the existing and new investment options and an explanation that, in the absence of affirmative investment instructions from the participant or beneficiary to the contrary, the account of the participant or beneficiary will be invested in the manner described in subparagraph (B),

(ii) the participant or beneficiary has not provided to the plan administrator, in advance of the effective date of the change, affirmative investment instructions contrary to the change, and

(iii) the investments under the plan of the participant or beneficiary as in effect immediately prior to the effective date of the change were the product of the exercise by such participant or beneficiary of control over the assets of the account within the meaning of paragraph (1).

(5) Default investment arrangements.

(A) In general

For purposes of paragraph (1), a participant or beneficiary in an individual account plan meeting the notice requirements of subparagraph (B) shall be treated as exercising control over the assets in the account with respect to the amount of contributions and earnings which, in the absence of an investment election by the participant or beneficiary, are invested by the plan in accordance with regulations prescribed by the Secretary. The regulations under this subparagraph shall provide guidance on the appropriateness of designating default investments that include a mix of asset classes consistent with capital preservation or long-term capital appreciation, or a blend of both.

(B) Notice requirements

(i) In general

The requirements of this subparagraph are met if each participant or beneficiary –

(I) receives, within a reasonable period of time before each plan year, a notice explaining the employee's right under the plan to designate how contributions and earnings will be invested and explaining how, in the absence of any investment election by the participant or beneficiary, such contributions and earnings will be invested, and

(II) has a reasonable period of time after receipt of such notice and before the beginning of the plan year to make such designation.

(ii) Form of notice.

The requirements of clauses (i) and (ii) of section 401(k)(12)(D) of title 26 shall apply with respect to the notices described in this subparagraph.

(d) Plan terminations

(1) If, in connection with the termination of a pension plan which is a single-employer plan, there is an election to establish or maintain a qualified replacement plan, or to increase benefits, as provided under section 4980(d) of title 26, a fiduciary shall discharge the fiduciary's duties under this subchapter and subchapter III of this chapter in accordance with the following requirements:

(A) In the case of a fiduciary of the terminated plan, any requirement –

(i) under section 4980(d)(2)(B) of title 26 with respect to the transfer of assets from the terminated plan to a qualified replacement plan, and

(ii) under section 4980(d)(2)(B)(ii) or 4980(d)(3) of title 26 with respect to any increase in benefits under the terminated plan.

(B) In the case of a fiduciary of a qualified replacement plan, any requirement –

(i) under section 4980(d)(2)(A) of title 26 with respect to participation in the qualified replacement plan of active participants in the terminated plan,

(ii) under section 4980(d)(2)(B) of title 26 with respect to the receipt of assets from the terminated plan, and

(iii) under section 4980(d)(2)(C) of title 26 with respect to the allocation of assets to participants of the qualified replacement plan.

(2) For purposes of this subsection –

(A) any term used in this subsection which is also used in section 4980(d) of title 26 shall have the same meaning as when used in such section, and

(B) any reference in this subsection to title 26 shall be a reference to title 26 as in effect immediately after the enactment of the Omnibus Budget Reconciliation Act of 1990.

2. Section 413 of the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1113, provides:

§ 1113. Limitation of actions

No action may be commenced under this subchapter with respect to a fiduciary's breach of any responsibility, duty, or obligation under this part, or with respect to a violation of this part, after the earlier of –

(1) six years after (A) the date of the last action which constituted a part of the breach or violation, or (B) in the case of an omission the latest date on which the fiduciary could have cured the breach or violation, or

(2) three years after the earliest date on which the plaintiff had actual knowledge of the breach or violation;

except that in the case of fraud or concealment, such action may be commenced not later than six years after the date of discovery of such breach or violation.

RESPONDENT'S BRIEF

No. 13-550

IN THE

Supreme Court of the United States

GLENN TIBBLE, ET AL.,

Petitioners,

v.

EDISON INTERNATIONAL, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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QUESTION PRESENTED

The limitations ruling under review in this case held that petitioners could not challenge the *initial* decision to include certain mutual funds in the 401(k) lineup before ERISA's six-year statutory repose period. The ruling explicitly allowed petitioners to challenge respondents' subsequent monitoring of, and failure to remove, the same funds during the repose period. Petitioners accordingly introduced evidence at trial seeking to establish that respondents acted imprudently by conducting inadequate reviews of the funds during the repose period and thereby failing to remove the funds. The district court found that petitioners' evidence was insufficient to prove that claim as a matter of fact.

The sole question raised by that ruling is:

Whether the district court clearly erred in its factual finding that petitioners' evidence was insufficient to establish that respondents committed new breaches during the repose period by imprudently monitoring and retaining the challenged funds.

RULE 29.6 STATEMENT

Respondent Edison International is the parent of respondent Southern California Edison Company. Edison International is a publicly traded company and has no corporate parent, and no publicly traded company beneficially owns more than 10% of its stock.

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INTRODUCTION

Petitioners make the right argument about the wrong case.

Petitioners' central legal argument is that under the Employee Retirement Income Security Act ("ERISA"), fiduciaries responsible for selecting investment options in a 401(k) plan lineup have an ongoing duty to monitor the options to ensure that they remain prudent choices for the plan. Accordingly, petitioners contend, they should have been allowed a trial on their claim that respondents breached their duty of prudence within ERISA's six-year period of repose by failing to adequately monitor and remove three mutual funds added before that period, because less expensive share classes were available in the same funds.

Petitioners have a problem: *the district court did not bar them from pursuing that claim*. To the contrary, petitioners tried exactly that claim, after the court explicitly held that ERISA's statute of repose did not bar claims that accrued during the repose period. Accordingly, petitioners at trial sought to prove that respondents breached their fiduciary duties by imprudently monitoring and retaining the challenged funds. Specifically, they argued that, while respondents monitored all investment options according to specific investment criteria with periodic (quarterly) reviews, there were "significant changes" within the three challenged funds that should have triggered a much deeper, "full due diligence review" of those funds, which would have identified the availability of less expensive share classes. The district court rejected that theory of imprudence, *not* on limitations grounds, but solely because petitioners'

evidence was insufficient to support their own changed circumstances theory. In the court's words: petitioners "have not met their burden of showing that a prudent fiduciary would have reviewed the available share classes and associated fees" for the three challenged funds. Pet. App. 149. Petitioners have never raised any substantive challenge to that factual finding.

This case, in short, does not present the limitations issue on which the Court granted certiorari, as evidenced by the fact that petitioners and respondents *agree* on its answer: No, ERISA's statute of repose does *not* bar a claim that a fiduciary breached its fiduciary duty by imprudently monitoring and retaining a given fund during the repose period, even if that fund was added before the repose period, so long as the plaintiff proves a *new* breach in the course of monitoring that fund. Put differently, no matter how the Court answers the Question Presented, the judgment below must be affirmed, because petitioners cannot establish—and do not even argue—clear error in the district court's factual finding that petitioners proved no new breach during the repose period as to the three challenged funds here.

The appropriate course in these circumstances is to dismiss the writ as improvidently granted, both because the limitations question on which certiorari was granted is not actually presented on this record, *see, e.g.*, *Rogers v. United States*, 522 U.S. 252, 259 (1998); *Smith v. Butler*, 366 U.S. 161, 161 (1961), and because the correctness of the judgment being reviewed turns entirely on case-specific factual findings, *see, e.g.*, *NLRB v. Hendricks Cnty. Rural Electric Membership Corp.*, 454 U.S. 170, 176 n.8 (1981).

In the alternative, the Court should affirm the judgment below. All agree that a fiduciary has an ongoing duty to monitor trust investments to ensure that they remain prudent. The only dispute even arguably at issue here concerns the *scope* of that duty, and whether it was fulfilled by respondents' quarterly reviews of the lineup options. The district court answered that question as a matter of fact, finding no breach during the repose period, and no authority under ERISA or trust law mandates a contrary result. There is certainly nothing requiring ERISA fiduciaries to conduct a full-scale, stem-to-stern diligence review of all investment options in a 401(k) lineup on a frequently recurring periodic basis. Any such rule would impose extraordinary administrative costs on plans, sponsors, and participants, contrary to ERISA's objectives.

Petitioners have abandoned their theory below that they were entitled to pursue their challenges to the three funds based on the continuing effects of imprudently including them in the first place. Petitioners now say they do not and need not seek to establish imprudence in the funds' initial inclusion, but only imprudence in failing to adequately monitor the funds. Petitioners are right to disavow their "continuing violation" theory—it is squarely at odds with the text and policies of ERISA § 413(1), as the Ninth Circuit explained. Yet in failing to identify any actual imprudence in respondents' monitoring process, petitioners' claim turns out to be materially identical to a continuing violation theory, and it fails for the same reasons.

If the writ is not dismissed, the judgment should be affirmed.

STATEMENT OF THE CASE

A. Legal Background

1. The Employee Retirement Income Security Act of 1974 "represents a careful balancing between ensuring fair and prompt enforcement of rights under [employee benefit plans] and the encouragement of the creation of such plans." *Conkright v. Frommert*, 559 U.S. 506, 517 (2010) (citations and quotations omitted). While ERISA seeks to protect employee retirement accounts, it also seeks to avoid "a system that is so complex that administrative costs, or litigation expenses, unduly discourage employers from offering ... benefit plans in the first place." *Varity Corp. v. Howe*, 516 U.S. 489, 497 (1996); *see Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 54 (1987).

ERISA imposes a variety of duties on fiduciaries of employee benefit plans, and allows participants to bring suit to obtain legal or equitable relief for violations of these duties. 29 U.S.C. §§ 1109(a), 1132(a)(2). At issue in this case is the duty of prudence imposed under ERISA § 404(a), which requires a fiduciary making investment decisions to act "with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims." *Id.* § 1104(a)(1)(B). As petitioners acknowledge, the "specific actions required by the duty of prudence may vary according to the factual circumstances." Petr. Br. 41 n.28; *see Frahm v. Equitable Life Assurance Soc'y*, 137 F.3d 955, 960 (7th Cir. 1998).

The prudent person standard, like much of ERISA, is informed by the common law of trusts.

Varity, 516 U.S. at 496. Trust law is not dispositive, but acts as "a starting point, after which courts must go on to ask whether, or to what extent, the language of the statute, its structure, or its purposes require departing from common-law trust requirements." *Id.* at 497; *see Harris Trust & Sav. Bank v. Salomon Smith Barney Inc.*, 530 U.S. 238, 250 (2000).

2. Congress's "careful balance" between protecting employees' retirement assets and encouraging employers to provide retirement plans by minimizing costs is reflected in the limitations provisions codified at ERISA § 413, 29 U.S.C. § 1113. The statute provides:

> No action may be commenced under this subchapter with respect to a fiduciary's breach of any responsibility, duty, or obligation under this part, or with respect to a violation of this part, after the earlier of—
>
> (1) six years after (A) the date of the last action which constituted a part of the breach or violation, or (B) in the case of an omission the latest date on which the fiduciary could have cured the breach or violation, or
>
> (2) three years after the earliest date on which the plaintiff had actual knowledge of the breach or violation;
>
> except that in the case of fraud or concealment, such action may be commenced not later than six years after the date of discovery of such breach or violation.

Id. While § 413(1) is sometimes referred to colloquially as a statute of "limitations," the six-year provi-

sion is actually a statute of repose because it "is measured not from the date on which the claim accrues but instead from the date of the last culpable act or omission of the defendant," *CTS Corp. v. Waldburger*, 134 S. Ct. 2175, 2182 (2014), as every circuit to have considered the issue has recognized, *see David v. Alphin*, 704 F.3d 327, 339 (4th Cir. 2013); *Ranke v. Sanofo-Synthelabo Inc.*, 436 F.3d 197, 205 (3d Cir. 2006); *Radford v. Gen. Dynamics Corp.*, 151 F.3d 396, 400 (5th Cir. 1998).

B. Factual Background

1. *Plan Overview And Structure*

Respondent Edison International, through its subsidiary Southern California Edison (collectively, "Edison"), offers a defined-contribution 401(k) savings plan (the "Plan") to current and former employees of Edison-affiliated companies. *See* Pet. App. 70. At the time of this litigation the Plan served around 20,000 employees and former employees, and had assets of approximately $3.8 billion. *Id.* at 13.

Prior to 1999, the Plan offered participants only six investment options. *Id.* at 72. The unions representing Edison employees sought more variety, specifically requesting the inclusion of retail mutual funds among the investment options so employees could more easily track their investments. *Id.* at 54. Following extensive negotiations, Edison in 1999 agreed to expand the Plan to offer about fifty investment options—including about forty retail mutual funds. *Id.* at 73, 169. The options covered a range of investment styles, risk profiles, fees, and the like. *Id.* Participants could freely choose where

to invest from among these options, and each fund's "expense ratio" was fully disclosed to participants.[1]

Edison also fully and repeatedly disclosed that "revenue sharing" from the retail mutual funds would be used to defray the costs of plan administration, as authorized by the Plan terms. Pet. App. 78, 80. In a revenue-sharing arrangement, a mutual fund shares part of the revenue reflected in its expense ratio with outside entities that provide administrative services to some of the fund's shareholders. For example, 401(k) plans typically retain third-party recordkeepers to provide recordkeeping services to all 401(k) plan participants, including investment tracking and participant communications (such as prospectuses and monthly statements). Because the plan recordkeeper's provision of those services obviates the need for the mutual fund to provide the same services to participants who invest in the fund through the plan, the fund may share with the recordkeeper a portion of its revenue as compensation for providing those services. *Id.* at 78-80. Whether a fund shares revenues with outside recordkeepers does not affect the cost of investing in the fund for any investor or participant, because by law the expense ratio must be uniform for all investors in a given share class. *Loomis v. Exelon Corp.*, 658 F.3d 667, 673 (7th Cir. 2011). In this case, some of the retail mutual funds initially included in the

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[1] A mutual fund's "expense ratio" is the percentage of the value of the fund's assets that is deducted to pay for various expenses, including investor communications and manager compensation. *See* Pet. App 79-80. For example, a fund from which one percent of assets is withdrawn each year to pay for portfolio management and other expenses has an annual expense ratio of 1%, or 100 "basis points."

Edison lineup shared revenues with the plan's outside recordkeeper, Hewitt Associates, LLC, which applied the revenues against its charges for recordkeeping services provided to the Plan, reducing the express costs of Plan administration. Pet. App. 78, 80.

The Plan's day-to-day administration, structure, and budgetary issues were run by Edison's Benefits Committee, while investment selection and monitoring was performed by Edison's Trust Investment Committee and Chairman's Subcommittee (together, the "Investment Committees"). Pet. App. 71-72. Edison employees who were investment professionals (the "Investment Staff" or "Staff") were specifically tasked with the job of "monitoring the Plan's investment options and, when needed, recommending to the Investment Committees that changes be made to the Plan's investment option line-up." *Id.* at 74; J.A. 150.

Respondents also relied on Hewitt Financial Services ("HFS") and Frank Russell Trust Company for extensive advice on the initial selection and subsequent monitoring of lineup options. Pet. App. 71, 75-76; J.A. 122-23, 152, 170-72, 175-77, 193, 206, 217

2. *Selection And Monitoring Of Investments*

When the Investment Committees were considering whether to add a new fund to the Plan, they conducted an "in-depth," "full due diligence review" of the proposed fund using research performed by the Investment Staff and HFS. Pet. App. 127-28; J.A. 154-55, 194-95, 234. The full due diligence review evaluated factors such as performance history, Morningstar ratings, expense ratios, and the public availability of information for share classes. J.A.

154-55, 157-58; Pet. App. 76-77. The review evaluated funds based on Edison's five "Investment Criteria": (1) the stability of the fund's overall organization; (2) the fund's investment process; (3) the fund's performance; (4) the fund's total expense ratio; and (5) with respect to mutual funds, the availability of information regarding the fund in newspapers and other widely available publications. J.A. 145, 151, 230; Pet. App. 75. Based on the information gathered in the full diligence review, the Investment Committees would ultimately decide whether to add a particular investment to the lineup. J.A. 157-58.

Separate from the in-depth, full diligence review marshaled when a new or replacement fund was under consideration, the Investment Staff also monitored all lineup options on a regular, periodic basis, through monthly, quarterly, and annual reports analyzing each fund's "short- and long-term performance, annualized performance, risk, and performance [compared to] benchmarks and peer groups." J.A. 152-53; *see* Pet. App. 75-76. The Staff met with HFS quarterly and annually to discuss and analyze these reports. Pet. App. 76; J.A. 169-70. In addition, the Staff conducted research and analysis regarding the investment options in the Plan by examining data from Morningstar and other online sources. Pet. App. 76-77. Working with HFS, the Staff identified "benchmarks" (typically general market indices, such as the Russell 2000 Value Index, that corresponded to the investment profile of each fund) to help determine whether the funds were meeting Edison's Investment Criteria. *Id.* at 76-77, 93-95; J.A. 178. The Staff evaluated fund performance "on a net-of-fee basis to ensure that relative performance comparisons [could] be made on a consistent basis."

J.A. 152, 178. The Staff's protocol for monitoring performance net-of-fees identified performance issues caused by outlier fees. 10/21/2009 Trial Tr. vol. 1, at 43:11-24.

If the Investment Staff's regular monitoring revealed warning signs—such as a performance issue, change in management, or deterioration in financial condition—suggesting that the fund in question might cease to meet Edison's Investment Criteria, the fund was moved to the "watch list." Pet. App. 76-77; J.A. 154. Funds on the watch list were categorized either "low priority" or "high priority," depending on the circumstances that triggered the concern. Pet. App. 94-95; J.A. 165.

Funds on the watch list were subject to review "in greater detail," tailored to the concerns identified, and were discussed at the Investment Committees' quarterly meetings. Pet. App. 76-77; J.A. 169-70, 178. The Investment Committees did not make changes to the plan lineup lightly, because changes could "cause participant confusion" as well as "disruptions to plan administration." J.A. 155, 199, 232. Accordingly, the Staff generally recommended changes in the Plan's offerings only if monitoring revealed "significant issues" under Edison's Investment Criteria. Pet. App. 77-78; J.A. 165, 199, 232.

3. *The Three Funds At Issue*

The three mutual funds still at issue in this case—the Janus Small Cap Value fund ("Janus fund"); Franklin Small-Mid Cap Growth fund ("Franklin fund"); and Allianz CCM Capital Appreciation fund ("Allianz fund")—were each added to the lineup in 1999 as part of the Plan overhaul negotiated with Edison's unions. Petitioners have disavowed

any claim that including these funds with retail-class shares in 1999 was imprudent (Petr. Br. 2, 36-37, 44, 45), and because the district court's limitations ruling barred any challenge to the initial decision to include the funds with retail-class shares, *see infra* at 14, the record contains no evidence as to why retail-class shares were chosen for the Janus and Allianz funds in 1999.[2]

As to the Franklin fund, however, petitioners acknowledge that respondents had a legitimate reason for offering participants retail-class shares: only the retail-class shares had "a Morningstar rating and significant performance history." Petr. Br. 40 n.27 (quotation omitted); *see* Pet. App. 96-97; J.A. 193. Participants in 401(k) plans often prefer options with published ratings and performance histories so they can take this information into account when evaluating their investment choices. *See Loomis*, 658 F.3d at 671-72; Investment Company Institute, *Understanding Investor Preferences for Mutual Fund Information* 10 (2006), *available at*

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[2] The district court observed that respondents did not explain why they did not initially select the institutional-class shares in the Janus and Allianz funds, Pet. App. 92, 94, but because petitioners' challenge to that initial decision was barred by ERISA's statute of repose, respondents had neither reason nor opportunity to proffer evidence concerning the circumstances of and motivations for that initial decision. There may well have been good reasons, as shown by the example of the Franklin fund discussed in the text. *See also infra* at 30-31. In any event, if the initial selection of retail-class shares in the Janus and Allianz funds was at all relevant to petitioners' claims, it was *petitioners'* burden to adduce evidence—through written or testimonial discovery—as to the reasons for and prudence of those selections.

http://www.ici.org/pdf/rpt_06_inv_prefs_full.pdf; *see also* Pet. App. 53-54; J.A. 124.

Retail-class shares often have higher expense ratios than institutional classes. Pet. App. 83-84. The difference in expense ratio between the institutional and retail share classes for the Janus, Franklin, and Allianz funds, for instance, ranged from 0.18% to 0.33%. *See id.* at 92, 94-95, 97. At the same time, however, institutional classes typically require a substantial minimum investment level. *Id.* at 83-84, 87, 90.[3]

In 2002, Edison added options to invest in retail-class shares of three other funds that also had institutional-class shares. Edison did not qualify for the institutional-class investment minimums of those funds, but the district court found (based on an expert's assertion) that the fund managers would have waived the minimums if Edison had requested a

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[3] The Solicitor General incorrectly states that "[f]or each of the six mutual funds challenged in this case, '[t]he only difference between the retail share classes and the institutional share classes was that the retail share classes charged higher fees to the Plan participants.'" U.S. Br. 18 (citing Pet. App. 128-29, and Pet. App. 61); *see also* Petr. Br. 7. The cited record passages refer only to the *three funds added during the repose period*. There are no findings that for the three funds added before the repose period, the "only difference" between the share classes was their expense ratios. To the contrary, the record shows that the share classes for the Franklin fund were different in ways other than cost. *See supra* at 11. As explained in the text, there may have been material differences between the share classes for all the funds.

waiver, Pet. App. 137-41, relying on evidence particular to those three funds, *id.* at 139.[4]

C. Proceedings Below

1. *Petitioners' Complaint*

Petitioners filed their action on August 16, 2007. Pet. App. 65. Following extensive discovery, petitioners filed the operative Second Amended Complaint (J.A. 53-100), which set forth 27 different theories of liability. One of the complaint's central theories was that respondents violated the duty of prudence by including *any* mutual funds in the Edison Plan lineup, on the ground that *all* mutual funds are unreasonably expensive compared to other available investment options. *E.g.*, J.A. 54. The complaint did not include any explicit allegations that respondents breached their duty of prudence by failing to remove funds with retail share classes when institutional share classes were available.

2. *The District Court's Summary Judgment Ruling: Petitioners May Assert Any And All Claims For Breaches Occurring During The Repose Period*

Respondents moved for summary judgment under the six-year repose period of ERISA § 413(1), but only as to "any claims based on purported breaches that occurred prior to August 16, 2001." D.C. Dkt. 146-2, at 24. In response, petitioners did not draw a distinction between claims based on conduct that occurred before August 16, 2001, and claims addressed to conduct occurring after. Instead, petitioners

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[4] The court characterized Edison's failure to seek a waiver as to the three new funds as a mere "oversight." D.C. Dkt. 448, at 8.

simply asserted that "the six year limitation does not apply in cases of fraud or concealment." D.C. Dkt. 198, at 24.

The district court granted summary judgment on the merits to respondents on all but two of the claims petitioners asserted: that respondents breached their duty of loyalty by offering mutual funds with revenue sharing during the repose period, and that they breached their duty of prudence by imprudently monitoring the fees of a money market fund selected in 1999 and otherwise imprudently managing the Plan's investment in that fund. Pet. App. 150-58, 166-67; J.A. 131-32, 139-40. Addressing respondents' argument based on § 413(1), the district court barred claims challenging decisions made before the repose period, holding that Petitioners' "claims will be limited to those that accrued within six years of the filing of this suit." Pet. App. 181. The court in no way restricted the theories or evidence petitioners could rely on to establish claims based on new breaches during the repose period.

3. *Petitioners' Belated, Narrow Share-Class Theory*

Petitioners introduced their theory of liability based on share classes for the first time in this case in a brief they filed shortly before trial was set to begin. D.C. Dkt. 323, at 1-2 (Oct. 1, 2009). "In preparing for (and during) trial," the district court observed, petitioners developed "a new legal theory regarding the selection of retail share classes rather than institutional share classes of certain mutual funds." Pet. App. 68-69. This new theory asserted "that Defendants violated both their duty of loyalty and their duty of prudence by investing in the retail

share classes of six mutual funds." *Id.* at 68. The court permitted petitioners to develop their new theory at trial notwithstanding its belated appearance. The court allowed petitioners to submit an amended expert report to support their share-class theory, and after the trial the court took supplemental briefing and additional evidence on the issue. *Id.* at 68-69.

Petitioners did not base their theory of breach as to the Janus, Franklin, and Allianz funds added in 1999 on the regular, periodic reviews respondents conducted during the repose period. Instead they sought to show that respondents should have conducted a *different* review of these three funds—a "full due diligence review of the funds, equivalent to the diligence review Defendants conduct when adding new funds to the Plan." *Id.* at 127-28. That distinct, full due diligence review was required, petitioners argued, because the Janus, Franklin, and Allianz funds "all underwent significant changes during the statute of limitations period that should have triggered" a "full due diligence review." *Id.* at 127.

Indeed, petitioners maintained an exclusive focus on changed circumstances allegedly meriting a "full due diligence review," despite being all but invited by the district court to develop a theory that ordinary-course monitoring should have revealed the share-class issue. In response to direct questioning by the court about the nature of the breach petitioners were asserting, petitioners' expert *refused* to opine that respondents should have identified the share-class issue in the funds during their regular, periodic review process. *See* J.A. 188-90. Petitioners' expert instead carefully limited his testimony to the contention that the share-class issue should have been identified because of *changes* in the funds "sig-

nificant enough that [they] should have triggered the committees *to deal with them as if they were new funds*." *Id.* at 189 (emphasis added). It was *only* "at that point," the expert explained, that respondents "should have ... identified, amongst other things, the share class issue." *Id.* at 189-90.[5] Following that exchange, petitioners' expert reiterated the point in his post-trial declaration: because of the ostensibly "significant changes" in the funds, he asserted, a prudent fiduciary would have evaluated the funds "in the same way a new fund added to the Plan would be evaluated," and "in so doing, would have identified the cheaper share class and determined that it was in the best interests of the Plan participants to utilize this cheaper share class." D.C. Dkt. 402-2, ¶¶ 27, 35 (reprinted at Appendix B, at 4a-6a).

Nowhere else in testimony or in their trial submissions did petitioners seek to establish that the alleged share-class issue should have been identified in respondents' regular, periodic reviews of the lineup options. Their entire case as to the Janus, Franklin, and Allianz funds instead was limited to trying to prove that significant changes in each fund required the distinct, full diligence review appropriate for adding new funds, at which point, they argued, the share-class issue should have been identified. *See, e.g.*, J.A. 185-90; D.C. Dkt. 393, at 15-19 (post-trial brief for petitioners: "Breaches for the [Janus, Allianz, and Franklin funds] Accrued within the Limitations Period Because The Name Changes were Accompanied by Events that Should have Trig-

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[5] The court's effort to probe this important distinction is reprinted in Appendix A to this brief as well as J.A. 188-90.

gered Substantive Evaluation like that Required for a 'New Fund.'"); D.C. Dkt. 402, at 3-8 (similar).

4. *The District Court's Factual Findings: Petitioners Failed To Prove A New Breach Of The Duty Of Prudence During The Repose Period*

After reviewing petitioners' trial testimony and post-trial submissions concerning the changes to the Janus, Franklin, and Allianz funds during the repose period, the district court rejected petitioners' contention that those changes were substantial enough to require the kind of full diligence review that, in petitioners' view, would properly have identified the alleged share-class issue. According to the court, petitioners "have not met their burden of showing that a prudent fiduciary would have reviewed the available share classes and associated fees ... as a result of the events" that petitioners claimed should have triggered a full due diligence review. Pet. App. 149-50.[6] And because petitioners

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[6] The change identified by petitioners in the Janus fund was "nothing more than a rebranding" (the fund previously had been called the Berger Small Cap Value Fund); the fund's management team, investment style, performance benchmarks, and Morningstar categorization remained the same. Pet. App. 93-94. The change in the Allianz fund was likewise merely a rebranding (it had been known as the PIMCO CCM Capital Appreciation Fund) following Allianz's acquisition of PIMCO, which again did not result in changes to management, investment strategy, Morningstar classification, or fund benchmarks. *Id.* at 95. Edison's Investment Staff put both the Janus and Allianz funds on the watch list for closer monitoring, but ultimately identified no concerns under the Investment Criteria warranting further action. The change in the Franklin fund was a revised investment strategy in September 2001 to allow investments in some larger companies. *Id.* at 97. Notwithstanding the new investment strategy, the fund's ownership and core managers remained the same after the change, Morn-

asserted no other basis on which respondents should have identified the alleged share-class issue in these three funds, the district court rejected petitioners' claim as to the Janus, Franklin, and Allianz funds.[7]

For the three funds added with retail-class shares in 2002, when respondents *did* conduct a full diligence review—as they always did when considering new funds—the court found that respondents breached their duty of prudence by failing to identify the institutional-class alternative and to seek a waiver of the investment minimum in order to offer it. *Id.* at 128-42. The court entered judgment and awarded a total of $370,732 in damages for all three funds combined. J.A. 237.

Finally, the district court rejected petitioners' other remaining claims that respondents breached their duty of loyalty by offering funds that provided revenue sharing to the Plan's recordkeeper. Pet. App. 117-25. The court found (for all funds) that respondents did not make "fund selections with an eye toward increasing revenue sharing" or advancing Edison's interests over those of the Plan's participants. *Id.* at 124-25. The evidence instead

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ingstar maintained its original style classification of the Fund, and many of the Fund's equity investments remained the same. *Id.* at 97-98, 148-49; J.A. 213-14, 226-27. Edison's Investment Staff consulted with HFS and decided to reclassify the Franklin Fund as a mid-cap fund, but again determined that no other changes were required. Pet. App. 98. Petitioners have never challenged on appeal any of the foregoing findings.

[7] Edison removed the Janus and Franklin funds from the lineup two years before trial. Pet. App. 94, 98. The Allianz fund remained in the Plan as of the district court's decision, *id.* at 95-96, 147, but Edison subsequently removed the fund when the Plan lineup was substantially overhauled in January 2011.

showed that the new funds added between 2002 and 2008 overwhelmingly offered *less* revenue sharing than the funds they replaced. *Id.* at 122-25.

5. *Petitioners' Appeal: Abandoning "Changed Circumstances" To Argue "Continuing Violations"*

On appeal, petitioners abandoned their theory that changes within the funds required Edison to conduct the kind of full diligence review necessary to have identified the alleged share-class issue. C.A. Dkt. 14, at 24-29; C.A. Dkt. 51-3, at 38 n.11. Instead of challenging the district court's factual findings as clearly erroneous, petitioners argued for the first time that ERISA § 413(1) "incorporates the continuing violation doctrine." C.A. Dkt. 14, at 26. Petitioners thus argued that they should be allowed to challenge the *initial decision* to include the Janus, Franklin, and Allianz funds in 1999 and thereby obtain damages for the six years prior to the filing of suit as a continuation of the original violation, based on the respondents' act of "keeping these funds in the Plan" and failing to identify and reverse the alleged initial selection error through "monitoring." *Id.* at 24-29. Petitioners did not point to any record evidence establishing that a prudent fiduciary would have identified the alleged share-class issue during regular, periodic reviews.

The Ninth Circuit affirmed the district court's summary judgment and trial rulings in full, addressing both the new "continuing violation" argument and the argument that respondents committed new breaches during the limitations period.

First, the court of appeals rejected petitioners' legal argument that § 413(1) incorporates a continuing

violation theory. The Ninth Circuit explained that this theory would effectively hold Edison liable for its *initial* selection of the funds: "[Petitioners'] logic confuses the failure to *remedy* the alleged breach of an obligation, with the commission of an alleged *second* breach, which, as an overt act of its own recommences the limitations period." Pet. App. 18 (citation and alterations omitted). Accordingly, the Ninth Circuit held that petitioners' continuing violation claims were time-barred insofar as they were merely a challenge to "the design of the plan menu" and thus effectively a challenge to the initial fund selection itself. *Id.* at 17-18.

Second, the Ninth Circuit agreed with both sides that ERISA fiduciaries have a duty "to exercise prudence on an ongoing basis." *Id.* at 19. Citing the general rule that "fiduciaries are required to act 'prudently' when determining whether or not to invest, or continue to invest," the Ninth Circuit held the district court was "entirely correct" to allow petitioners to offer evidence that a new breach occurred during the limitations period. *Id.* (quotation omitted). But in addressing the only argument petitioners raised at trial to demonstrate a new breach—the changes within the three funds allegedly warranting full diligence review—the Ninth Circuit found no error in the district court's ruling that petitioners failed to meet their burden of proof. *Id.*

SUMMARY OF THE ARGUMENT

I. The writ should be dismissed as improvidently granted. Petitioners' argument in this Court is that the district court improperly applied the statute of repose to bar them from trying to prove at trial that respondents committed new breaches of the duty of

prudence during the repose period by inadequately monitoring the Janus, Franklin, and Allianz funds and failing to remove them. But petitioners were allowed to prove exactly that claim at trial—their proof just failed as a matter of fact. The Court did not grant certiorari to consider the factual correctness of the ruling, or to consider arguments about the appropriate scope of a fiduciary's continuing duty to review existing plan investment options. As for the question the Court did grant review to consider, the parties agree on its answer, demonstrating its irrelevance to the actual dispute between them.

II. If the Court does reach the merits of the judgment below, it should affirm. The district court did not clearly err in finding that petitioners failed to establish a breach of the duty of prudence during the repose period.

A. Petitioners' challenge rests on the premise that it is per se imprudent to keep funds with retail-class shares in a 401(k) lineup when institutional-class shares of the same funds are available. But a fiduciary may have perfectly legitimate reasons to add—or maintain—retail-class shares rather than institutional-class shares, including different published performance histories, ratings, and investment minimums. A plaintiff challenging a given retail-share class fund therefore must *prove* why it was imprudent to add or maintain the fund, not simply assume the imprudence.

B. In addition to incorrectly assuming the categorical imprudence of retail-class shares, petitioners wrongly assume that the process of adding funds is equivalent to the process of monitoring them for potential removal. Under common law trust principles,

a full due diligence review generally is required before initially selecting trust assets. After that initial selection, the fiduciary may conduct much less intensive periodic reviews, monitoring only for significant changes in the value and risks of the investments. None of the trust-law sources cited by petitioners establish that the duty to monitor entails frequently recurring full diligence reviews of the kind on which petitioners' claim d[illegible]nds.

ERISA likewise does not impose any such duties on fiduciaries monitoring existing plan investments and lineup options. To the contrary, a rule requiring constant, exhaustive reviews, re-reviews, and re-re-reviews would impose staggering costs, undermining a core ERISA objective of promoting plan formation by minimizing plan expenses. Such costs would inevitably be passed on to participants to some extent, either in the form of increased fees, reduced benefits, or both. And repeated exhaustive reviews would encourage repeated changes to lineup options, subjecting participants to instability, paperwork, and confusion. Avoiding such disruption for participants is exactly why respondents' monitoring process was designed—partly in response to a complaint from an Edison employee union—to remove or replace funds only when significant issues arise under the specific Investment Criteria applied in periodically reviewing existing funds.

C. Because the process of adding investment options differs significantly from the process of subsequently monitoring them, the question whether it was imprudent to *add* a given fund likewise differs significantly from the question whether it was imprudent to *maintain* the same fund. In this case, the undisputed record evidence shows that respondents

engaged in a prudent monitoring process, reviewing all options periodically to track their net-of-fee performance compared to benchmark and to identify other developments relevant to the Investment Criteria. The district court's unchallenged factual findings determined that respondents did not act imprudently by not conducting the more intensive full diligence review of the three challenged funds that, according to petitioners' trial expert, would have identified the share-class issue with those three funds. Nothing in trust-law or ERISA precedents required such a review as a matter of law. And petitioners' expert *refused* to opine that respondents should have identified the alleged share-class issue in the funds during their regular, periodic review process. There was accordingly no factual or legal error in the trial court's judgment.

III. Petitioners complain that the Ninth Circuit's opinion characterizes their claim as asserting a form of "continuing violation" theory, but this Court reviews *judgments*, not opinions. And the judgments below are correct for the reasons explained above. In any event, petitioners clearly did assert on appeal a continuing violation theory, which was correctly rejected.

A. Although petitioners now deny resting thei claims on a continuing violation theory, their claims amount to the same thing, given their failure to challenge the district court's factual finding that respondents acted prudently in monitoring and retaining the challenged funds. Absent any imprudence in the post-selection monitoring process, petitioners' claims necessarily challenge only the continuing effects of an allegedly imprudent initial selection.

B. That theory of liability is contrary to the text and purpose of ERISA § 413(1). Because the bar to suit established by § 413(1) is based on the *last* culpable act of the defendant, it constitutes not just a traditional statute of limitations, but a statute of repose. As such, the provision establishes not just a time limit on suit, but a period after which the defendant is to have absolute freedom from liability for pre-repose acts. Holding fiduciaries liable for simply failing to reverse allegedly imprudent pre-repose decisions would render the textual right to repose meaningless and other portions of the statute superfluous.

C. Petitioners' invocation of the "omission" provision in § 413(1)(B) only highlights the flaws in their claims. That provision prohibits the filing of suit more than six years after the latest date on which the fiduciary could have cured an earlier omission. If an actionable "omission" can simply be a fiduciary's failure to correct some earlier allegedly imprudent decision, in many cases the latest date would never arrive—presumably most fiduciaries in theory could at any time revisit and correct errors made long ago, so every day they omit to do so creates a new six-year window for suit. The statute of repose would thus establish the opposite of repose: perpetual liability.

D. Enforcing the right to repose will not permanently immunize funds added before the repose period from review. Everyone agrees that fiduciaries must act prudently in monitoring existing investment options and deciding whether and when to remove or replace them. A plaintiff thus is not barred by § 413(1) from seeking to establish that a fiduciary committed a new breach of that duty during the re-

pose period, so long as the claim is based on distinct facts establishing that the fiduciary acted imprudently in the process of monitoring existing funds. Further, patently imprudent funds are unlikely to go undetected and unchallenged for six full years, and if they do it will often be because of fraud or concealment—in which case the repose period will not commence until the imprudence is exposed. And even if some legitimate claims of imprudence go unremedied, that result is inevitable for any statute of repose, the very *point* of which is to terminate liability for what would otherwise be a viable claim.

E. Finally, subjecting fiduciaries to liability for pre-repose decisions would harm plan participants and impose the kind of costs that Congress worried would discourage employers from offering ERISA plans.

ARGUMENT

I. THE WRIT SHOULD BE DISMISSED AS IMPROVIDENTLY GRANTED

This case does not present the question the Court granted certiorari to consider. There is, at most, only a factbound dispute concerning the sufficiency of the evidence petitioners introduced at trial to support their claims that respondents committed new breaches of their fiduciary duties during the repose period by imprudently monitoring and retaining the Janus, Franklin, and Allianz funds.

When plenary consideration reveals that "the record does not fairly present the question that [the Court] granted certiorari to address," the writ normally will be "dismissed as improvidently granted." *Rogers v. United States*, 522 U.S. 252, 259 (1998); *see Smith v. Butler*, 366 U.S. 161, 161 (1961) (dismissing

writ where, "[a]fter full argument and due consideration, it became manifest that the course of litigation and the decisions in the Florida courts did not turn on the issue on the basis of which certiorari was granted"). The Court similarly will dismiss the writ when it turns out to "present[] primarily ... a question of fact, which does not merit Court review." *NLRB v. Hendricks Cnty. Rural Elec. Membership Corp.*, 454 U.S. 170, 176 n.8 (1981); *see* Robert L. Stern et al., *Supreme Court Practice* 362 (10th ed. 2013) ("Because review of a factual matter 'would be of no importance save to the litigants themselves,' it is ... appropriate to dismiss the writ." (quoting *S. Power Co. v. N.C. Pub. Serv. Co.*, 263 U.S. 508, 509 (1924))).

Those considerations apply fully here. Petitioners' entire opening brief rests on the premise that the trial court applied ERISA § 413's six-year statute of repose to bar them from pursuing a claim that respondents committed new breaches of prudence during the repose period as to the Janus, Franklin, and Allianz funds. Petr. Br. 11, 13, 14; *see* U.S. Br. 4 (same). The court did no such thing.

As explained above, respondents' motion based on § 413(1) sought only to exclude imprudence claims for alleged breaches accruing *before* the repose period. *Supra* at 13. Petitioners' sole response was that their claims challenging the pre-repose *initial* selection should proceed because § 413(1)'s fraud or concealment exception applied. *Id.* at 13-14. The district court agreed with respondents, and accordingly barred claims challenging decisions made before the repose period. *Id.* The court did not bar any claim asserting new breaches during the repose period, or impose any restrictions on the theories or evidence

respondents could introduce to prove such a claim. *Id.*

At trial, petitioners chose to prove their claim in a particular way. As detailed above, petitioners did *not* try to prove that respondents should have identified the share-class issue in their regular, periodic monitoring of the Janus, Franklin, Allianz, and other funds in the lineup. They instead chose to limit their claim to an argument that significant changes in the three funds should have triggered the more in-depth, full diligence review applied to *new* fund selections. *Supra* at 15-17. When the court specifically pressed petitioners' expert to address whether in his opinion routine monitoring should have revealed the share-class issue, the expert did not endorse that theory, instead reiterating his contention that changes within the funds should have triggered the full diligence review otherwise appropriate only for adding new funds. *Supra* at 15-16; *see also* App. A, at 1a-3a; App. B, at 4a (¶ 27), 5a-6a (¶ 35).

Petitioners thus starkly mischaracterize the record in stating that the district court prohibited petitioners from asserting a new breach during the repose period *unless* they could identify "'significant changes during the [repose] period'" that "'should have triggered [respondents] to conduct a full diligence review.'" Petr. Br. 13 (quoting Pet. App. 127). The district court did not impose any such restriction. In the opinion passage petitioners cite, the district court was describing *petitioners' own theory* based on changes within the funds. Nowhere in the record is there so much as a hint that the district court conditioned petitioners' claim of breach during the repose period on proof of changed circumstances.

In short, petitioners were allowed to pursue at trial *exactly* the claim they now say they should have been allowed to pursue at trial, i.e., "whether respondents acted imprudently in retaining the retail-class shares throughout the limitations period." Petr. Br. 40 n.27; *see id.* at 41 n.28 ("To reverse the holding below, it is sufficient to conclude that petitioners have raised a genuine issue of material fact that, by failing to consider the availability of lower-cost institutional shares and failing to remove the higher-cost retail-class shares for six years, respondents breached their duty of prudence."). The district court rejected that claim on its merits as a matter of fact, not on limitations grounds as a matter of law. The sole question properly raised by that ruling is whether the court's factual finding is clearly erroneous. And the answer to that factbound, case-specific question has nothing to do with the answer to the limitations question on which the Court granted certiorari. No matter how the Court answers that question, the judgment still must be affirmed unless the Court finds that the district court clearly erred in rejecting petitioners' prudence claim on its merits. The irrelevance of the limitations question is confirmed by the fact that respondents *agree* with petitioners on its answer: a claim challenging retention of a fund added to the lineup before the repose period is not time-barred, *if* the claim actually asserts new, distinct breaches during the repose period, i.e., that the fiduciaries conducted imprudent reviews and thereby failed to remove an existing fund that a prudent fiduciary would have removed.

The only relevant disagreement is whether respondents in fact breached their monitoring duty, and the district court resolved that dispute after a

full and fair trial. Petitioners have not challenged the court's factual findings, and this Court did not grant certiorari to review them.

The writ should be dismissed.

II. THE DISTRICT COURT DID NOT CLEARLY ERR IN FINDING THAT RESPONDENTS ACTED PRUDENTLY IN MONITORING AND RETAINING THE CHALLENGED FUNDS DURING THE REPOSE PERIOD

A. It Is Not Categorically Imprudent To Include Funds With Retail-Class Shares Merely Because Institutional-Class Shares Are Available

Petitioners' current effort to find error in the trial court's judgment seeks to distract from the actual trial record by suggesting that no prudent fiduciary would ever, under any circumstances, include mutual funds with retail-share classes in a 401(k) lineup when institutional-class shares in the same fund are available. *E.g.*, Petr. Br. 32 ("some investments (such as retail-class shares of a mutual fund that offers institutional-class shares providing the same investment with lower fees) are imprudent in any portfolio"). But there are—or can be—differences material to a fiduciary's evaluation of mutual fund share classes, and thus imprudence in the inclusion of retail-class shares must be proved through evidence, not just asserted or assumed.

As a general matter, there is no requirement that an ERISA fiduciary focus solely on the cost of an investment to the exclusion of other considerations. "[N]othing in ERISA requires every fiduciary to scour the market to find and offer the cheapest possible fund (which might, of course, be plagued by

other problems)." *Hecker v. Deere & Co.*, 556 F.3d 575, 586 (7th Cir. 2009); *see Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 596 (8th Cir. 2009) (a fiduciary might "have chosen funds with higher fees for any number of reasons, including potential for higher return, lower financial risk, more services offered, or greater management flexibility"). As the Ninth Circuit put it, there are "simply too many relevant considerations for a fiduciary, for [this] type of bright-line approach to prudence to be tenable." Pet. App. 55.

More specifically, despite their lower cost, institutional-class shares are not categorically superior to retail-class shares for all 401(k) plans in all circumstances. The record in this case proves the point: because the Franklin fund institutional-class shares were new, they did not have a Morningstar rating or a significant performance history, *see supra* at 11, which would have left participants without important information to evaluate in deciding whether to direct their retirement funds to that option. Moreover, the performance of retail-class shares was more likely to be covered in daily newspapers, making it easier for participants to track the fund's performance. Institutional-class shares also typically require minimum investment amounts, which a given 401(k) may or may not be able to satisfy, or which may or may not be waivable. *See supra* at 12-13. Finally, many plan fiduciaries choose retail-class shares over institutional-class shares to obtain greater revenue sharing, which is used to defray costs of plan administration (*see supra* at 7-8) that would otherwise under plan terms be imposed on

participants through per-capita or per-transaction fees.[8]

For the foregoing reasons, the "fundamental proposition that no investments or techniques are imprudent per se," Restatement (Third) of Trusts, Ch. 17 Intro. Note, at 290 (2007), is as true for different mutual fund share classes as it is for any other type of investment. Accordingly, it was incumbent on petitioners to affirmatively *prove*, through sufficient competent evidence, that respondents acted imprudently by not removing the Janus, Franklin, and Allianz funds on share-class grounds during the repose period.

B. The Requirements Of Prudence In Monitoring And Removing Funds Differ Significantly From The Requirements Of Prudence In Adding New Funds

In addition to wrongly assuming the categorical imprudence of including retail-class shares over institutional-class shares, petitioners wrongly treat the process of monitoring and removing funds as equivalent to the process for adding new funds. *See* Petr. Br. 47-48. Petitioners thus rely heavily on the district court's finding that respondents acted imprudently in *adding* three funds with retail-class shares during the repose period as proof that respondents acted imprudently in *retaining* three different funds added before the repose period. *Id.* at 11-13, 39-41.

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[8] Unlike most plan sponsors, Edison agreed to bear the costs of plan administration. Accordingly, respondents did not consider revenue sharing in evaluating funds, as the district court found. *See supra* at 18-19.

Petitioners' equation of the review required for adding funds with the review required for monitoring funds is directly at odds with their own trial theory, which treated the two inquiries as separate and distinct. *See supra* at 14-17. At trial, petitioners' expert distinguished periodic monitoring reviews from the "full due diligence review" appropriate for evaluating potential new options, and suggested that only the latter, more in-depth review would be expected to identify a less expensive share class within an existing fund. *See supra* at 15-16.

Petitioners' current theory is contrary not only to their own trial theory, but also to the trust-law principles they now invoke. *See* Petr. Br. 24-28. It is also at odds both with ERISA's core objective of promoting plan formation by minimizing administrative costs, and with the interests of plan participants in avoiding instability and confusion over 401(k) lineup options.

1. *Trust Law Does Not Require A Full Due Diligence Review During Routine Monitoring*

a. Common law trust principles do not support petitioners' suggestion (Petr. Br. 48) that a fiduciary must conduct a complete diligence review of all investments on a frequently recurring periodic basis after they are selected. A full diligence review, including a thorough vetting of alternative investment products that can achieve the trust's purposes, instead is required *before* initially selecting investments for trust assets. *See* George G. Bogert, *The Law of Trusts and Trustees* § 685, at 393 (2d ed. 1946) ("*Bogert's Trusts and Trustees* (2d ed.)"); Restatement (Second) of Trusts § 227 cmt. o, at 535 (1959); American Bankers' Ass'n Trust Company Di-

vision, *Handbook for the Review and Survey of Trust Securities* 16 (1930) ("*ABA Handbook*"). Once investments are selected, a fiduciary must monitor only for significant changes in the value and risks of the investments. *See* III Austin W. Scott, *The Law of Trusts* § 231, at 1883 (3d ed. 1967) ("duty to consider whether in view of the circumstances there is danger that [the assets] will subsequently fall in value"); George G. Bogert et al., *The Law of Trusts and Trustees* § 684, at 146 (3d ed. 2009) ("*Bogert's Trusts and Trustees* (3d ed.)") ("duty to reevaluate the trust's investments periodically as conditions change"); Restatement (Second) of Trusts § 231 cmt. a, at 550-51 (duty to divest "if owing to a subsequent change in circumstances the investment is no longer a proper investment"); *Bogert's Trusts and Trustees* (2d ed.) § 685, at 393-94.

Trust-law treatises advise monitoring fiduciaries to watch for such changes as "a serious depreciation in the market price of the investment, a noticeable diminution in the value of the property which secures the investment, [or] an important adverse change in the financial situation of the obligor." *Bogert's Trusts and Trustees* (3d ed.) § 685, at 161-65 (footnote omitted). The Restatement provides similar guidance, suggesting a trustee monitor "the marketability of the particular investment" and "the probable condition of the market with respect to the value of the particular investment at the termination of the trust," among other considerations. Restatement (Second) of Trusts § 227 cmt. o, at 535; *see also* Uniform Prudent Investor Act § 2(c) (1995).

As these factors indicate, the duty to monitor under trust law involves periodic reviews to identify significant changes to the value or risk of the asset.

The trustee of a mortgage, for instance, must "keep in touch with the general real estate market in the vicinity of the mortgaged property, and, if he has any reason to suspect a *marked falling off in market price*, he should have a revaluation of the property made and act accordingly." *Bogert's Trusts and Trustees* (2d ed.) § 685, at 395 & n.99 (emphasis added). Similarly, trustees of corporate obligations are counseled to "keep abreast of the announcements received from corporations" and to track "the relative yearly [financial] progress made by the company under consideration." *ABA Handbook* at 37, 45. Significant depreciation of an investment should cause the trustee to examine the asset more closely and dispose of it if necessary. *See In re Stark's Estate*, 15 N.Y.S. 729, 731-32 (N.Y. Sur. Ct. 1891); *Johns v. Herbert*, 2 App. D.C. 485, 499 (1894).

But absent meaningful triggering events like these, a trustee "need not make as complete an investigation as he was under a duty to make originally, and he need not watch the [stock] ticker as a speculator would." Scott, *The Law of Trusts* § 231, at 1882; *see Beam v. Paterson Safe Deposit & Trust Co.*, 92 A. 351, 351 (N.J. 1914) (not the duty of a trustee "to watch the 'ticker'"); *O'Neill v. O'Neill*, 865 N.E.2d 917, 921-22 (Ohio Ct. App. 2006); Austin W. Scott et al., *Scott and Ascher on Trusts* § 19.4, at 1450-51 (5th ed. 2007).

b. None of the trust-law sources petitioners cite supports their view that post-selection monitoring entails the same full diligence review appropriate when considering the addition of a new fund. Petitioners' main support for their theory—a passage they quote four times—is the following sentence from the Bogert treatise: "The duty to review trust

investments should be performed by the collection of information currently as changes occur, *and also by a systematic consideration of all the investments of the trust at regular intervals*, for example, once every six months." Petr. Br. 16, 26, 29, 48 (citing *Bogert's Trusts and Trustees* (3d ed.) § 684, at 147-48) (emphasis as in Petr. Br. 29); U.S. Br. 13-14 (same). But to say there must be "systematic consideration" says nothing about the *scope* of that consideration, and the cited support makes clear that it does *not* contemplate a full diligence review.[9]

For example, Bogert identifies the practice of the Comptroller of the Currency "as a model for all corporate trustees," *Bogert's Trusts and Trustees* (3d ed.) § 684, at 148; *see id.* at 148 n.13, and the Comptroller's guidelines explicitly distinguish between the review process when first accepting an account and subsequent monitoring each year. *See* U.S. Dep't of Treasury, *Comptroller's Handbook: Personal Fiduciary Services* 27-32 (Aug. 2002). The initial review is a comprehensive assessment that requires detailed consideration of all of the account documents and a formal due diligence process. *Id.* at 27, 30-31; *see* 12 C.F.R. § 9.6(a)-(b). By contrast, once an account is accepted, the monitoring is geared toward assessing dynamic risk to the value of a portfolio. U.S. Dep't of Treasury, *Comptroller's Handbook: Investment Management Services* 12 (Aug. 2001); U.S.

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[9] The surrounding text also makes it clear that periodic reviews are geared toward monitoring for *changes* to an investment, not attributes that have been static since the investment was initially selected. *See Bogert's Trusts and Trustees* (3d ed.) § 684, at 144-45 (trustee must "reevaluate the trust's investments periodically as conditions change").

Dep't of Treasury, *Personal Fiduciary Services* at 32; *see* 12 C.F.R. § 9.6(c).[10]

The trial court decision in *Stark's Estate* (Petr. Br. 29-31) also does not suggest any duty to conduct full-scale diligence reviews during routine monitoring. To the contrary, the judge in *Stark's Estate* observed only that a trustee must be "watchful" and must "keep himself informed" about matters such as "depreciation," missed interest payments, "the pecuniary responsibility of the obligor," and in general "to take all lawful prudent means with a fair degree of promptness to ... prevent a loss coming to the estate." 15 N.Y.S. at 731.

c. Respondents engaged in just the kind of monitoring process contemplated by the *Stark's Estate* judge, the Bogert treatise, and other trust-law sources, as petitioners elsewhere concede. Petr. Br. 8-10, 40. Respondents monitored "on an as-needed basis" when changes occurred, Pet. App. 76, such as when a fund changed its investment style, *id.* at 144-45. Respondents *also* systematically reviewed the funds on a "monthly, quarterly, and annual basis," reviewing a variety of performance and risk factors and comparing the funds to appropriate benchmarks. *Id.* at 75-76.

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[10] The other sources Bogert cites for the discussion of periodic reviews confirm that these are not the full diligence reviews conducted at the investment selection stage. *See Bogert's Trusts and Trustees* (3d ed.) § 684, at 148 n.13. These resources generally take guidance from the Federal Reserve Board's Regulation F, which simply requires an annual review of investments "to determine their *safety and current value* and the advisability of retaining or disposing of them." Fed. Res. Bd., Reg. F, § 6(c) (as amended Dec. 31, 1937) (emphasis added).

Nothing in trust law indicates that those periodic reviews were insufficiently frequent or searching. Nor does any trust-law source establish that, absent the kind of materially changed circumstances petitioners failed to prove at trial, respondents were required to conduct a full due diligence review during their regular monitoring process. ERISA imposes no such duty either, as the next section shows.

2. *ERISA Does Not Require Fiduciaries To Conduct Full-Scale Diligence Reviews In The Absence Of Materially Changed Circumstances*

No ERISA case or formal guidance from the Department of Labor suggests that fiduciaries' duty to conduct periodic reviews entails full diligence reviews. Even the Solicitor General's brief here for the DOL falls short of asserting such an extreme position.

The absence of authority is not surprising, because requiring that sort of exhaustive review as a routine matter—i.e., absent changed circumstances warranting closer scrutiny—would be contrary to ERISA's core objective of promoting plan formation by minimizing plan expenses. *See supra* at 4. Even regular, periodic monitoring is complicated and costly, as the facts of this case show. Edison employed both full-time internal Investment Staff and outside consultants at HFS to conduct the periodic review process for identifying developments that might affect the funds' performance and risk. Pet. App. 72-76. If that process involved full diligence reviews on a regular basis, plans or their sponsors would be required to expend enormous resources to investigate every investment option every few months, compar-

ing each one to every possible alternative in the market.[11] The costs imposed by that process on all 401(k) plans in the United States would be staggering.

And such costs are inevitably passed on to participants, to some extent, in one form or another. Participants themselves pay some portion of costs directly in most 401(k) plans. U.S. GAO Report to Congressional Requesters, *401(k) Plans: Increased Educational Outreach and Broader Oversight May Help Reduce Plan Fees* 21 (Apr. 2012) ("[p]articipants generally pa[y] part or all of the fees charged for key 401(k) plan services"), *available at* http://www.gao.gov/assets/600/590359.pdf. Even when employers have agreed to bear costs, they may choose to offset the massive expense of frequent full diligence reviews by reducing services, offerings, or other benefits—precisely the outcome that ERISA seeks to avoid by minimizing administrative and litigation expenses. *See supra* at 4.

In addition to the increased direct monetary costs imposed on employers and participants, a dramatically intensified, frequently recurring full diligence review process would result in a constantly changing lineup that would subject participants to significant informational and transactional costs. Participants would face a constant flurry of notices—not to mention frequent requests to redirect their investment funds or face involuntary "remapping"—every time a full diligence review identified "better" options. *E.g.*,

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[11] Petitioners say there is "no precise rule for how frequently such a reexamination must occur," but they suggest it must happen "from time to time," perhaps "once every six months." Petr. Br. 26; *see* U.S. Br. 13-14.

29 U.S.C. § 1104(c)(4)(B)-(C). Respondents' own review policies were designed to avoid precisely this kind of "participant confusion" by limiting fund changes to situations in which "significant issues arise" and the fund no longer met Edison's Investment Criteria. J.A. 165, 199; *see also id.* at 155, 202-03, 232. This policy was adopted partly in response to complaints from one of the Edison employees' unions. Pet. App. 134-35 & n.21.

These employee concerns illustrate why the process and standards for removing a fund must be different from the process and standards for initially selecting a fund. A fund that a prudent fiduciary would not *add* might still be a fund that a prudent fiduciary would not *remove*, not only because of the different review process employed during monitoring, but also because of participants' reliance interests both in the particular fund and in the overall stability of the lineup.

C. The District Court Did Not Err In Rejecting Petitioners' Trial Claim That Respondents Acted Imprudently In Monitoring And Retaining The Challenged Funds

For the reasons discussed in the prior section, the process for monitoring and removing 401(k) lineup options has never been understood as equivalent to the process for deciding which options should be included in the first place.

It is therefore incorrect to suggest that plan fiduciaries necessarily breach their ongoing monitoring duties when they fail to remove an option that should not have been included in the lineup initially. The question, rather, is whether the issue overlooked

in *selecting* the option is one that would be identified in the distinct process used to *monitor* existing options, and also whether the issue is substantial enough to require *removing* the option given considerations of cost, reliance, stability, and simplicity for participants.

The undisputed record here shows that respondents engaged in a state-of-the-art monitoring process, reviewing all options periodically to track their net-of-fee performance compared to benchmark and to identify other developments relevant to the specific Investment Criteria. *See supra* at 8-10. Petitioners' own expert repeatedly declined to opine that the periodic review process should have identified a share-class issue in the funds added before the repose period. *See supra* at 15-16. And no deeper, full diligence review was required as a matter of fact (according to the district court) or as a matter of law (according to trust-law and ERISA precedents). The district court accordingly did not err in rejecting petitioners' claim that respondents committed new breaches of the duty of prudence during the repose period by not conducting a full diligence review of the Janus, Franklin, and Allianz funds and thereby identifying the alleged share-class issue and removing the funds.

The two cases on which petitioners (Petr. Br. 34-35) and the Solicitor General (U.S. Br. 25-26) rely most heavily—*Petrella v. Metro-Goldwyn-Mayer, Inc.*, 134 S. Ct. 1962 (2014), and *Bay Area Laundry & Dry Cleaning Pension Trust Fund v. Ferbar Corp. of California*, 522 U.S. 192 (1997)—actually help explain why petitioners' claims failed at trial. In *Petrella*, the Court held that once a copyright plaintiff establishes that a given work is infringing, each sub-

sequent act of copying the work "gives rise to a discrete claim." 134 S. Ct. at 1969 (citations and alteration marks omitted). In *Bay Area Laundry*, the Court held that once the plaintiff proves that the defendant was required to make installment payments, "each missed payment" constitutes a new breach. 522 U.S. at 208-10. In each situation, in other words, the plaintiff needed only to establish an original wrongful act, and thereafter each repetition of the *same* act necessarily constituted a new breach.

Here, by contrast, the original act of including an allegedly imprudent fund is factually and legally *different* from the subsequent acts involved in deciding whether to retain the fund, for the reasons explained above.[12] Accordingly, retaining the fund is not simply a repetition of the original act of including the fund—the facts establishing the distinct, subsequent breach must be pleaded and proved distinctly. Petitioners were given the opportunity to make that showing at trial, but they could not do so.

For similar reasons, petitioners gain nothing by citing *Fifth Third Bancorp v. Dudenhoeffer*, 134 S. Ct. 2459 (2014), and then-Judge Scalia's concurring and dissenting opinion in *Fink v. National Savings & Trust Co.*, 772 F.2d 951 (D.C. Cir. 1985), for the unexceptionable proposition that "retention of an imprudent investment can constitute a breach of ERISA's duty of prudence." Petr. Br. 27. The question is not whether retaining an imprudent investment *can* breach the duty of prudence, but *under what circumstances*, and whether the circumstances

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[12] In addition, both *Petrella* and *Bay Area Laundry* involved statutes of limitations rather than repose. *See* 17 U.S.C. § 507(b); 29 U.S.C. § 1451(f)(1); *Waldburger*, 134 S. Ct. at 2182.

of a particular case establish such a breach. The district court here answered that case-specific question, and neither *Dudenhoeffer* nor Judge Scalia's *Fink* opinion suggests that a contrary finding was compelled by ERISA. Indeed, the Court in *Dudenhoeffer* rejected, as legally insufficient under the particular circumstances of that case, an allegation that the fiduciaries imprudently retained an investment that precipitously declined in market value. 134 S. Ct. at 2471. By contrast, a precipitous decline in value was enough for Judge Scalia to consider the imprudent-investment claim in *Fink* viable in the specific circumstances of that case, *see* 772 F.2d at 962, but of course respondent here *did* monitor for changes in performance, *see supra* at 9-10. And what matters in any event is that petitioners were given the chance at trial to establish imprudence in respondents' monitoring and retention of the Janus, Franklin, and Allianz funds. The district court found their proof insufficient as a purely factual matter, and there is no basis in ERISA or trust law for reversing that finding.

III. THE NINTH CIRCUIT CORRECTLY REJECTED THE "CONTINUING VIOLATION" THEORY PETITIONERS ASSERTED ON APPEAL

Ignoring the actual summary-judgment and bench-trial rulings under review, petitioners take issue with language in the Ninth Circuit's opinion affirming those rulings. But "[t]his Court, like all federal appellate courts, does not review lower courts' opinions, but their *judgments*." *Jennings v. Stephens*, No. 13-7211, slip op. 6 (Jan. 14, 2015); *see Chevron, U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 842 (1984). And the judgment under

review is that petitioners failed as a matter of fact to prove the very claim they now want to assert, *viz.*, that respondents acted imprudently during the repose period because their monitoring process did not identify and address the alleged share-class issue with the Janus, Franklin, and Allianz funds.

Petitioners' objections to the Ninth Circuit's analysis lack merit in any event.

A. Petitioners' Current Theory Is Equivalent To A "Continuing Violation" Challenge To The Initial Fund Selection

Petitioners chiefly complain that the Ninth Circuit characterized their claim as an effort to "either equitably engraft onto, or discern from the text of section 413 a 'continuing violation' theory," i.e., a claim that the initial selection of the Janus, Franklin, and Allianz funds in 1999 remained a violation during the repose period "without more." Pet. App. 17. But petitioners' opening brief explicitly argued that "ERISA's six-year limitation incorporates the continuing violation doctrine." C.A. Dkt. 14, at 26. Indeed, the theory was a tactical *necessity* given their failure of proof at trial: only a continuing violation theory would enable petitioners to challenge respondents' failure to reverse the initial selection *without* establishing that respondents conducted imprudent reviews during the repose period—the showing rejected on its merits by the trial court.

The Ninth Circuit rejected the continuing violation theory as a matter of law, Pet. App. 17-19, and petitioners themselves all but concede the correctness of that ruling—they now deny that their claim is based in any way on imprudence in the initial fund selection *before* the repose period. *See* Petr. Br.

36-37 ("petitioners do not base their claim on the March 1999 decision to provide retail-class shares of the three funds at issue"); 45 ("A claim based on the failure properly to monitor and remove imprudent investments within the six years preceding the filing of the complaint does not premise liability on the initial decision to include an investment outside of the limitations period.... For petitioners' claims ... the imprudence of the original investment decision is immaterial."); *see also id.* at 2, 44, 46. Yet to the extent petitioners disregard the actual record and findings concerning respondents' post-selection review of the funds, they can only assert a claim functionally identical to a claim impermissibly challenging the initial selection itself. That is, absent sufficient proof of a *subsequent, distinct* breach in the monitoring process, a claim challenging retention of funds selected before the repose period "is not truly one of a failure to remove an imprudent investment," but "is, at its core, simply another challenge to the initial selection of the funds to begin with." *David*, 704 F.3d at 341; *see Fuller v. Suntrust Banks, Inc.*, 744 F.3d 685, 701 (11th Cir. 2014).

To assert a timely challenge to a fund added before the repose period, a plaintiff must identify facts "that would allow [the court] to distinguish between the alleged imprudent acts occurring at selection from the alleged imprudent acts occurring thereafter." *Fuller*, 744 F.3d at 701. Such facts include changed circumstances that would have prompted a prudent fiduciary to review and remove an option. *Id.* at 700-01; Pet. App. 19; *see supra* at 33-34. Petitioners tried to establish such changed circumstances at trial but failed, and they have since given up distinguishing between alleged imprudence in the

initial selection of the Janus, Franklin, and Allianz funds and the alleged imprudence in continuing to retain them. Because petitioners' "allegations concerning [respondents'] failure to remove the [challenged funds] are in all relevant respects identical to the allegations concerning the selection process," their claims are in substance a challenge to the pre-repose initial selection process, *Fuller*, 744 F.3d at 701, and they cannot be revived on a continuing violation theory, for the reasons explained in the following sections.

B. The Text Of ERISA § 413(1) Bars Claims Challenging Fund-Selection Decisions Implemented Before The Repose Period

Section 413(1) prohibits any claim challenging "a fiduciary's breach of any responsibility, duty, or obligation" that is filed more than "six years after (A) the date of the last action which constituted a part of the breach or violation, or (B) in the case of an omission the latest date on which the fiduciary could have cured the breach or violation." 29 U.S.C. § 1113(1). The measurement "from the date of the last culpable act or omission of the defendant" makes the bar a statute of repose. *CTS Corp. v. Waldburger*, 134 S. Ct. 2175, 2182 (2014); *see supra* at 5-6.

As a statute of repose, § 413(1) does more than impose a time limit on suit—it erects an "absolute bar on a defendant's temporal liability." *Waldburger*, 134 S. Ct. at 2183 (quotation and alterations omitted). Indeed, absent fraud or concealment, the plaintiff's injury from the assertedly unlawful act "need not have occurred, much less have been discovered," for a claim to be barred. *Id.* at 2182 (quotation omitted). A statute of repose provides "free-

dom from liability," even where the liability would otherwise be unquestioned, and thus "embodies the idea that at some point a defendant should be able to put past events behind him." *Id.* at 2183. Section 413(1), in sum, "suggests a judgment by Congress that when six years has passed after a breach or violation, and no fraud or concealment occurs, the value of repose will trump other interests, such as a plaintiff's right to seek a remedy." *Larson v. Northrop Corp.*, 21 F.3d 1164, 1172 (D.C. Cir. 1994).

Holding fiduciaries liable for failing to reverse pre-repose decisions, "without more," would obviously render the textual right to repose "meaningless." Pet. App. 18. Indeed, the statute would create the *opposite* of repose, subjecting fiduciaries to potential liability for "decisions which may have been made decades before and for which institutional memory may not exist." *Id.* (quotation omitted). Far from keeping events of the distant past in the distant past, the statute would keep those events tethered permanently to the present, separated only by a rolling six-year limitation on recoverable damages. *See* U.S. Br. 25-27. Congress, however, knows how to create a rolling damages limitation period, and it looks nothing like the repose language Congress used in § 413(1). *See, e.g.*, 42 U.S.C. § 2000e-5(g)(1) ("Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission."). Section 413(1) is not a damages rule, but "a judgment that defendants should be *free from liability* after the legislatively determined period of time, beyond which *the liability will no longer exist* and will not be tolled for any reason." *Waldburger*, 134 S. Ct. at 2183 (emphasis added; quotation omitted).

Allowing allegedly imprudent acts to remain permanently subject to attack on a continuing-duty-to-correct theory under § 413(1) also would make nonsense of other statutory language. If a fiduciary's failure to correct a previous breach by itself constitutes a new breach absent proof of subsequent imprudence, the same is true with respect to the "actual knowledge" subsection, § 413(2). Even a plaintiff who had actual knowledge of a fiduciary's imprudent decision at the moment it was made could sue at any time in the future—even decades later—simply by framing the claim as a breach of the continuing duty to correct.

The theory would also effectively negate the provision that "in the case of fraud or concealment, [an] action may be commenced not later than six years after the date of discovery of such breach or violation." 29 U.S.C. § 1113. This clause "provides amelioration in the worst cases while, at the same time, indicating that Congress meant to toll the statute only in instances of fraud or concealment." *Larson*, 21 F.3d at 1172. But if an allegedly imprudent act always remains subject to attack for failure to correct the act, the "fraud or concealment" proviso serves little purpose: a plaintiff could always bring a timely suit by pleading breach of the failure to correct the original act, regardless whether the act had been concealed. That result could not more directly contravene the function of repose.

C. Petitioners' "Omission" Theory Only Highlights The Deficiency Of Their Claims

Petitioners' and the Solicitor General's invocation of the "omission" provision in § 413(1)(B) only fur-

ther undermines their position, by confirming that their analysis would eviscerate the statute of repose. Section 413(1)(B) by its terms permits suit, "in the case of an omission," up to six years after "the latest date on which the fiduciary could have cured the breach or violation." 29 U.S.C. § 1113(1)(B). But if an actionable omission can be nothing more than the failure to correct an earlier decision or act that constituted a breach, it would ordinarily be difficult, if not impossible, to identify the "latest date" on which the fiduciary could have corrected the earlier decision or act—so long as it remains in place and subject to the fiduciary's control, the fiduciary presumably could undo it, no matter how many years have passed since the decision or act was implemented. On that view of the "omission" proviso, there would literally be no repose at all in many or most cases of fiduciary breach.

That intolerable outcome helps explain why a claim challenging a pre-repose act cannot be framed as merely challenging the failure to cure a pre-repose breach. The challenge instead must address proven imprudent omissions—e.g., a failure to respond to developments warranting full diligence review and removal of a fund—in the *subsequent process* of managing plan assets.

The problem is especially acute here, now that petitioners have explicitly disclaimed any effort to establish any breach—whether by act or omission—in the initial selection of the Janus, Franklin, and Allianz funds. As the case comes to the Court, there is no factual or legal basis for assuming that it was imprudent to include those funds with retail-class shares in the lineup in 1999. Indeed, as shown

above, respondents may well have had good reasons for doing so. *See supra* at 11-12, 29-31.

Petitioners' long-overdue concession that their claims do not depend on showing a breach in the initial selection process only highlights the burden they had at trial to identify exactly which aspects of the monitoring process during the repose period they consider imprudent, why and how a prudent fiduciary would have conducted a different monitoring process, and what evidence establishes that fact. Petitioners recognized that burden at trial, but their evidence was found insufficient to prove the post-repose monitoring breach they alleged. Petitioners have never raised any substantive challenge to that factual finding. Therefore, despite petitioners' attempt to repackage their claim, they are still essentially merely challenging respondents' alleged failure to correct a breach in the initial selection, even though petitioners are no longer alleging a breach in the initial selection.

D. Enforcing The Right To Repose Will Not Permanently Immunize Funds Added Before The Repose Period From Review

Petitioners and the Solicitor General warn that enforcing the repose period will "immunize imprudent plan investments" added before the repose period so long as "circumstances have not significantly changed." U.S. Br. 31; *see* Petr. Br. 49. Not so.

To start, as already discussed at length, respondents and the Ninth Circuit agree with petitioners and the Solicitor General that "fiduciaries are required to act 'prudently' when determining whether or not to ... continue to invest." Pet. App. 19 (quoting *Quan v. Computer Scis. Corp.*, 623 F.3d 870, 878-

79 (9th Cir. 2010)). A plaintiff thus is *not* barred by § 413(1) from seeking to establish that a fiduciary committed a new breach during the repose period by maintaining a given fund in the lineup, so long as the claim is based on distinct facts establishing that the fiduciary acted imprudently in the process of monitoring existing funds.

What is more, patently imprudent funds are unlikely to remain in a lineup for six years, or to go unchallenged by entrepreneurial lawyers when they do. Few if any fiduciaries would ever *want* to act imprudently (disloyalty in the face of conflicting incentives might be a different concern, but there is no such issue here), especially given the liability that could result from allowing patent imprudence to fester openly for years. And if an imprudent act does manage to go uncorrected, undetected, and unchallenged for six full years, it is almost certainly because the act was affirmatively concealed, in which case the repose period would not commence until the imprudence was exposed.

Finally, if some imprudent acts do go unremedied despite all the foregoing safeguards and vehicles for challenge, that is the inevitable consequence of a statute of repose. *Waldburger*, 134 S. Ct. at 2182. When a statutory limit operates to bar a claim, "it is generally immaterial whether hardship to one or the other party results, because the legislature, in formulating the statute, has presumably already balanced the respective hardships to its own satisfaction." *Scott and Ascher on Trusts* § 24.24.2, at 1785 (5th ed.).

E. Subjecting Fiduciaries To Liability For Pre-Repose Acts Would Increase Costs To The Detriment Of Participants

The strict repose period of § 413(1) promotes Congress's core objective of avoiding the kind of "administrative costs" and "litigation expenses" that "discourage employers from offering [ERISA] plans in the first place." *Conkright v. Frommert*, 559 U.S. 506, 517 (2010) (quotations omitted); *see supra* at 37-39.

Holding fiduciaries liable merely for failing to reverse pre-repose decisions would directly contravene that objective. As discussed above, the existing periodic review process already requires the investment of significant resources. *See supra* at 8-10, 37-39. Exponentially greater resources would be required if fiduciaries knew they could be held liable for decisions made in the distant past, with only the small comfort that damages would range back "only" six years. And as also discussed above, such costs invariably are passed on to participants to some degree, as higher fees, reduced benefits, or both. *See supra* at 38.

CONCLUSION

For the foregoing reasons, the writ of certiorari should be dismissed as improvidently granted. In the alternative, the judgment below should be affirmed.

Respectfully submitted,

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APPENDIX

APPENDIX A

The following transcript passage is reprinted at J.A. 188-90:

THE COURT: .... Why is it relevant as to whether the—it was a name change or the fund remained the same? Isn't it part of your thesis that even if a mutual fund was in the plan prior to August of 2001 and the fund had purchased the retail shares and the retail shares, class shares, were more expensive fee wise than the institutional share class, all things being equal, that within the statutory period, that is August 2001, forward, that the plan was obligated to exchange that for the institutional share, or is your testimony limited to when a fund first came into the plan?

THE WITNESS: Well, I think that in the case of these three funds that counsel is discussing, I believe that the events that I address are significant enough that they should have triggered a due diligence process.

THE COURT: But not so with regard to a plan—a fund that came into the plan pre-August 2001 that didn't have some structural change ... or mission change with the three funds that we're talking about here. There you are not saying that due diligence would have required the plan to transfer from retail to institutional.

THE WITNESS: I guess what I'm saying—

THE COURT: I want to get the clarification.

THE WITNESS: Yeah. For these three funds, I believe that the events that are identified should have triggered a due diligence process and that the result of that due diligence process would have identified—

should have identified that there was an alternate share class that the plan should have been invested in.

THE COURT: Let me put it a different way: Let's say that these plans didn't have a name change, that they existed as they were initially put into the plan, and because of the statute of limitations, there couldn't be any damage except for August of 2001. Would you contend that if these plans—that the three in question before their name changes and/or structural change were in the plan, that during the relevant time period due diligence would have required the plan to nevertheless buy an institutional share class, all things being equal, assuming the institutional share class had a lower fee?

THE WITNESS: Well, in a perfect world, independent of ... when the option initially went into the plan, I would think that some due diligence process should be undergone with some frequency. Could be quarterly, could be annually—

THE COURT: That isn't really the thrust of your testimony, right?

THE WITNESS: It is a part because I believe that with respect to these three funds, even though they were in the plan prior to the time period that you identified, I believe that what occurred in these funds was significant enough that it should have triggered the committees to deal with them as if they were new funds because, in fact, they were. They weren't legally new entities, they weren't new—well, in two cases they were—but it wasn't because the legal entity changed, but because there were significant enough changes in the funds that the due diligence process should have been triggered and it

should have at that point identified, amongst other things, the share class issue.

APPENDIX B

The following passage is excerpted from the Rebuttal Declaration of petitioners' expert witness, Dr. Steven Pomerantz, D.C. Dkt. 402-2, filed April 7, 2010 (footnotes omitted):

27. On three of the funds at issue in this case, the Franklin Small Mid-Cap Growth Fund, the Janus Small Cap Investors Fund, and the Allianz CCM Capital Appreciation Fund, I previously addressed the fact that the funds should be evaluated in the same way a new fund added to the Plan would be evaluated because they were subject to significant structural or mandate changes.

28. Mr. Esch's stance that the reorganization of a fund's parent company would result in simply a "name change[]" that fiduciaries would not need to further investigate is inaccurate. As I stated in my trial declaration, with the rebranding of the funds came a potential shift in investment strategy of the management of the fund. The fiduciaries should have taken that time to evaluate the fund just as they would a new fund being added to the Plan.

29. Furthermore, stability of the investment management process is of paramount concern for investors. It is for this reason that a prudent financial expert should scrutinize an investment when there is any type of significant change to the fund, such as a potential change in portfolio management or a change in fund ownership. In particular, a prudent financial expert should be concerned whether, under new ownership, a continuity of the underlying investment team and process will remain.

30. Additionally, Defendants themselves recognized that the changes to the Allianz and Janus

funds warranted further review when they placed these funds on an internal watch list, a list that required that the funds be closely examined by the fiduciaries.

31. As to the Franklin fund, Mr. Esch contends that the significant style change to the fund was not of great concern, rather, it was simply a conversion of shares by Franklin from the Franklin Small Cap Growth Fund to the Franklin Small-Mid Cap Growth Fund.

32. A change in the mandate of a fund that is so great that it is re-categorized from a Small Cap to a Small-Mid Cap fund is quite significant.

33. Furthermore, the Edison fiduciaries knew that the mandate change was a significant change because they, internally, changed its categorization on their own documents. The change was not merely cosmetic, but was a change to the very nature of the fund itself, and a prudent financial expert would have investigated that change further and, in doing so, would have noted the significantly lower fees offered by the institutional share class and changed to that less expensive share class.

34. Additionally, during the time of the changes to the Franklin and Janus Funds, Morningstar, a service used by Defendants in evaluating and monitoring their funds, issued a number of statements regarding these funds that should have alerted the Plan fiduciaries of a need to closely review the funds.

35. Given the significant changes and further potential changes to these funds when they were rebranded, a prudent and loyal fiduciary would have investigated these funds and, in so doing, would have identified the cheaper share class and deter-

mined that it was in the best interests of the Plan participants to utilize this cheaper share class.

REPLY BRIEF

No. 13-550

IN THE
Supreme Court of the United States

GLENN TIBBLE, ET AL.,
Petitioners,

v.

EDISON INTERNATIONAL, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR PETITIONERS

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The Ninth Circuit misinterpreted ERISA in affirming the district court's judgment dismissing petitioners' claims as untimely. Petitioners are participants in the Edison retirement plan. They presented evidence that respondents, who are fiduciaries of that plan, breached their fiduciary duty of prudence by offering retail-class shares of six mutual funds as investment options when institutional-class shares of the same funds were available. The institutional shares are identical in all relevant respects to the retail-class shares, except they charge lower fees. The district court concluded after a trial that respondents behaved imprudently by offering retail-class shares of the three funds added to the plan in 2002, and the court of appeals affirmed that conclusion. But the lower courts held that ERISA's six-year limitations provision for fiduciary-breach claims barred petitioners' claims regarding the three funds added in 1999, because those funds were first selected as investment options more than six years before the suit was filed.

The lower courts misconstrued the statute. ERISA requires fiduciaries of covered retirement plans to act as a "prudent" person would act under the circumstances. 29 U.S.C. § 1104(a)(1)(B). The statute places no temporal limit on that duty in the context of plan investments. *See id.* Background principles of trust law, and the United States' views, confirm that fiduciaries are obligated to review investments periodically and remove imprudent ones; their duties do not end with the initial selection of an investment. Plan participants may file an action within six years of a breach, *see id.* § 1113(1), and proof that a fiduciary has failed appropriately to monitor and remove an imprudent investment establishes a breach of ERISA's duty of prudence that is actionable for six years under the limitations provision.

The efforts of respondents and their *amici* to defend the Ninth Circuit's judgment are unpersuasive. Respondents do not quarrel with our reading of the limitations provision: they concede that each breach of ERISA's fiduciary-duty provision is actionable for six years. Nor do they dispute that ERISA's duty of prudence encompasses obligations to review the prudence of existing investments and to remove imprudent ones. And they no longer contest that they breached their fiduciary duties by choosing more expensive retail-class shares in 2002, when institutional-class shares were available.

Respondents contend, however, that a fiduciary's obligation to review existing investments applies only when "significant changes" in circumstances necessitate a "full diligence review." Br. 33, 48. Nothing in ERISA or background principles of trust law supports that limitation on ERISA's duty of prudence, and trust-law sources confirm that no such limitation exists. The obligation to review existing investments does not necessarily entail as thorough an examination as occurs when initially selecting an investment; the test is what a reasonably prudent fiduciary would do in the same or similar circumstances. But no prudent review could have overlooked the problem with the retail-class shares at issue here: the same investment was available at a lower cost to plan participants through the institutional-class shares. Neither respondents nor their *amici* offer any reason why a prudent fiduciary would continue to offer retail-class shares under those circumstances.

Unable to justify the Ninth Circuit's decision on the merits, respondents urge this Court to dismiss the writ as improvidently granted. They assert, for the first time in their merits brief, that this case

does not present the question on which this Court granted review because the district court permitted petitioners to establish at trial a breach of the duty of prudence within the limitations period based on any theory of petitioners' choosing. That contention mischaracterizes the record. As respondents themselves successfully argued in the lower courts, the district court held on summary judgment that ERISA's limitations provision barred petitioners' claims relating to funds first added to the plan more than six years before the complaint was filed, unless petitioners could prove "changes" sufficient to warrant a full "due diligence process."[1] The correctness of the Ninth Circuit's affirmance of that legal conclusion is squarely presented in this Court.

ARGUMENT

I. THE NINTH CIRCUIT ERRONEOUSLY BARRED PETITIONERS' TIMELY CLAIMS

As fiduciaries of the Edison ERISA plan, respondents had a duty to engage in the kind of periodic monitoring of investment options that a reasonably prudent fiduciary would conduct and to remove investment options that reasonable monitoring would reveal to be imprudent. Claims arising from breaches of those duties in the six years preceding commencement of this suit are timely under ERISA. That conclusion follows from the statutory text and background principles of trust law against which ERISA was enacted.

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[1] *See, e.g.*, Dkt. 381, at 13.

A. ERISA's Duty Of Prudence Does Not Cease When A Fiduciary Selects An Investment

1. ERISA fiduciaries must act "with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims." 29 U.S.C. § 1104(a)(1)(B). That statutory "standard of care" is "derived from the common law of trusts," *Central States, Se. & Sw. Areas Pension Fund v. Central Transp., Inc.*, 472 U.S. 559, 570 (1985), which similarly imposes a duty on trustees "to administer the trust as a prudent person would," Restatement (Third) of Trusts § 77(1) (2007); *accord* Restatement (Second) of Trusts § 174 (1959); George T. Bogert et al., *The Law of Trusts and Trustees* § 541, at 159 (rev. 2d ed. 1993) ("Bogert"); *see* Pet. Br. 22-24; U.S. Br. 9-12, 15-16. Respondents agree (at 4) that ERISA's prudence standard "is informed by the common law of trusts."

A component of the duty of prudence is the "duty to be cost-conscious." Restatement (Third) of Trusts § 88 cmt. a. "Trustees, like other prudent investors, prefer (and, as fiduciaries, ordinarily have a duty to seek) the lowest level of risk and cost for a particular level of expected return." *Id.* § 90 cmt. f(1). Mutual fund expenses "require special attention by a trustee." *Id.* § 90 cmt. m. Because differences in fund expenses "can be significant, it is important for trustees to make careful overall cost comparisons, particularly among similar products of a specific type being considered for a trust portfolio." *Id.*; *see* Pet. Br. 6 & n.1, 24-25; U.S. Br. 12-13, 33-34. Here, respondents' own investment criteria required consideration of expenses on an ongoing basis, *e.g.*,

JA145, 183, so the investment committees and staff would have been expected to consider the availability of lower-cost institutional-class shares.

Respondents do not dispute that investment expenses are important to the prudence inquiry, arguing only (at 29) that costs are not the "sole[]" relevant consideration. When, however, institutional-class shares offer the same investment as retail-class shares, but with lower expenses, the institutional-class shares are guaranteed to perform better "on a net-of-fee basis." Resp. Br. 9 (internal quotation marks omitted); *see* Pet. Br. 39; U.S. Br. 18-19; App. 84. In those circumstances, a difference in cost can be dispositive in choosing among share classes.

2. The duty of prudence includes an obligation to engage in prudent and periodic review of existing investments.[2] Respondents concede that point (at 3): "a fiduciary has an ongoing duty to monitor trust investments to ensure that they remain prudent."

The duty to monitor does not apply "only" when "significant changes" have occurred, as respondents assert (at 33).[3] The responsibility to collect "infor-

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[2] *See* Pet. Br. 24-28; U.S. Br. 13-15; 4 Mark L. Ascher et al., *Scott and Ascher on Trusts* § 19.1.2, at 1394-95 (5th ed. 2007) ("[T]he trustee has a continuing duty to supervise the trust's investment strategy."); Restatement (Third) of Trusts § 90 cmt. b; Bogert § 684, at 147-48 (3d ed. 2009); *Johns v. Herbert*, 2 App. D.C. 485, 499 (1894) ("[i]t was [the trustee's] duty to watch the investment with reasonable care and diligence"); *In re Cady's Estate*, 207 N.Y.S. 385, 387 (App. Div. 1925) ("[A trustee's] duty is not discharged when he has taken securities, but he must be actively vigilant to ascertain whether or not the investment is unsafe and insecure and constantly growing more so; and for want of reasonable care in that respect he is chargeable for the losses caused by depreciation.").

[3] Respondents are inconsistent regarding the scope of the monitoring duty. Although they assert (at 33) that a fiduciary

mation currently as changes occur," Bogert § 684, at 147, is *an aspect of* the duty to monitor. But a fiduciary "also" must monitor "by a systematic consideration of all the investments of the trust at regular intervals, for example, once every six months." *Id.*; *see* Pet. Br. 28-33; U.S. Br. 13-14.[4]

The duty to conduct reasonably prudent periodic reviews, even absent changed circumstances, is a basic application of ERISA's general standard of reasonable prudence, incorporated from trust law. Because no decisionmaker is infallible, *cf. Brown v. Allen*, 344 U.S. 443, 540 (1953) (Jackson, J., concurring in the result), a prudent fiduciary would revisit previous investment decisions periodically, even when unaware of any significant changes. Thus, a fiduciary who makes an imprudent investment and thereafter fails to monitor the investment prudently has committed two distinct breaches: "*First*, in making the original investment of the fund; and, *second*, in the failure to use . . . proper care, watchfulness, and oversight" in monitoring the investment. *In re Stark's Estate*, 15 N.Y.S. 729, 732 (N.Y. Surrogate's Ct., Rensselaer Cnty. 1891); *see also Cady's Estate*, 207 N.Y.S. at 387 (trustee breached fiduciary duty by investing in speculative stocks because "he made no inquiry concerning the stocks before their purchase, . . . and it does not appear that he made any inquiry afterward as to their value or future security").

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must monitor "only for significant changes," elsewhere (at 37) they appear to acknowledge that fiduciaries have a "duty to conduct periodic reviews."

[4] The leading benefits consulting groups advise fiduciaries to conduct regular reviews of investment performance and fees, *see* AARP Br. 13-15, and most plan fiduciaries in fact engage in periodic reviews, *see* Pension Rights Center Br. 13 (65% of plan sponsors conduct quarterly reviews and 95% at least conduct annual reviews), as respondents did here, Pet. Br. 9.

Those principles of trust law apply fully under ERISA. An ERISA fiduciary that "has made (*or held*) patently unsound investments" has violated its duty "to invest prudently," and plan participants may recover damages arising out of the imprudent retention of investments. *Fink v. National Sav. & Trust Co.*, 772 F.2d 951, 962-63 (D.C. Cir. 1985) (Scalia, J., concurring in part and dissenting in part) (emphasis added); *see* U.S. Br. 15-16.[5]

Respondents attack a straw man (at 32-39) by insisting that they were not required to repeat a "full due diligence review." Periodic reviews of existing investment options must be prudent, but neither petitioners nor the United States contend that those reviews must always be as thorough as reviews undertaken when initially selecting an investment option. No precise rule dictates how often a fiduciary must review the portfolio or how detailed periodic reviews must be; rather, as with trust administration generally, the duty to monitor is subject to the reasonable-person standard. That is, the fiduciary must engage in the kind of review that a reasonably prudent fiduciary would conduct under the circumstances.[6] Here, moreover, no "full-scale, stem-to-

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[5] *See also DiFelice v. U.S. Airways, Inc.*, 497 F.3d 410, 418 (4th Cir. 2007); *Martin v. Consultants & Adm'rs, Inc.*, 966 F.2d 1078, 1087-88 (7th Cir. 1992); *Morrissey v. Curran*, 567 F.2d 546, 549 n.9 (2d Cir. 1977); *Buccino v. Continental Assurance Co.*, 578 F. Supp. 1518, 1521 (S.D.N.Y. 1983).

[6] *See, e.g.*, Restatement (Second) of Trusts § 231 cmt. b ("[t]he trustee is under a duty to use reasonable care to keep himself informed in regard to the property which he holds in trust"); Restatement (Third) of Trusts § 90 cmt. d (trustee must "exercise reasonable effort and diligence in . . . monitoring investments"); Bogert § 684, at 146 ("a trustee must exercise reasonable care, skill, and caution" in monitoring investments).

stern diligence review" (Resp. Br. 3) would have been required to determine that continuing to offer retail-class shares was imprudent given the availability of "institutional share classes offer[ing] the exact same investment at a lower cost to the Plan participants." App. 130. Respondents could have, and should have, recognized that fact during the quarterly reviews they were already conducting. Reversing the decision below therefore will not impose on employers the supposedly "staggering" administrative burdens hypothesized by respondents and their *amici*. *See* Resp. Br. 37-39; ESOP Ass'n Br. 3; NAM Br. 21-22.

B. A Fiduciary's Failures Prudently To Monitor And Remove Investments Give Rise To Timely Claims Under 29 U.S.C. § 1113(1)

Claims for breaches of the duty to monitor investments and remove imprudent ones are timely if brought within six years of the imprudent monitoring or failure to remove. *See* Pet. Br. 34-38; U.S. Br. 17-18, 22-23. The limitations provision for breaches of ERISA fiduciary duties provides that a claim is timely if brought within six years of "(A) the date of the last action which constituted a part of the breach or violation, or (B) in the case of an omission the latest date on which the fiduciary could have cured the breach or violation." 29 U.S.C. § 1113(1). Thus, a plan participant may bring claims arising out of any fiduciary breach (by action or omission) occurring within six years of filing suit. Again, respondents expressly concede petitioners' point, stating (at 2) that § 1113(1) "does *not* bar a claim that a fiduciary breached its fiduciary duty by imprudently monitoring and retaining a given fund during" the six-year period, "even if that fund was added before" that period.

This Court's cases confirm that a claim arising out of a breach within the limitations period does not become untimely because it relates in some way to an earlier alleged breach outside the limitations period for which the plaintiff could not pursue a claim. *See* Pet. Br. 34-37; U.S. Br. 25-27. In *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 134 S. Ct. 1962 (2014), for example, this Court held that a copyright holder could pursue claims for infringement that occurred within three years of the lawsuit, even though the original act of infringement occurred 18 years previously. *See id.* at 1967-69. So long as a "freestanding violation" occurs, it "may always be charged within its own charging period regardless of its connection to other violations." *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618, 636 (2007). Respondents' failures to review and remove imprudent investment options within the limitations period are therefore actionable, even for investments initially selected outside of that period. No other result comports with § 1113(1)'s text, which states that the six-year period runs from the "*last* action" or "*latest* date" of an omission, regardless of when the *first* action related to the breach occurred. 29 U.S.C. § 1113(1) (emphases added).

Petitioners' and the United States' interpretation does not, as respondents assert (at 48), "eviscerate" the limitations provision by making all breaches actionable indefinitely so long as the fiduciary has not "cured" them. In the ordinary course, failure to cure a prior breach is not an independent breach and would not give rise to a timely claim. For example, a challenge to a prohibited transaction in which a fiduciary collected an improper commission, *see* 29 U.S.C. § 1106, would be untimely if not commenced within six years of the transaction, because that claim

would involve no breach of an ongoing duty within the limitations period. By contrast, this case concerns the acknowledged "ongoing duty to monitor" existing investment options, the violation of which constitutes a "*new* breach" actionable for six years. Resp. Br. 2-3.

C. Enforcing ERISA's Duty Of Prudence With Respect To Existing Investments Supports ERISA's Purposes

Permitting plan participants (and the Secretary of Labor) to enforce ERISA's duty of prudence with respect to existing investment options furthers Congress's stated purpose of "protect[ing] . . . the interests of participants in employee benefit plans and their fiduciaries, . . . by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, *and by providing appropriate remedies, sanctions, and ready access to the Federal courts.*" 29 U.S.C. § 1001(b) (emphasis added). The Ninth Circuit's limitations ruling is unfaithful to ERISA's purposes because it would bar any judicial scrutiny of the prudence of investment options that have been offered for more than six years, absent proof of changed circumstances. *See* Pet. Br. 50-51; U.S. Br. 31-32. Respondents bravely assert (at 50) that "patently imprudent funds are unlikely to remain in a lineup for six years, or to go unchallenged." But *that is this case*: the evidence shows that respondents maintained as investment options retail-class shares of mutual funds when institutional-class shares of the same funds offered an identical investment at a lower cost to plan participants. *See* Pet. Br. 7-10; U.S. Br. 18-20. Respondents removed the retail-class shares of the 1999 funds as investment options only after this lawsuit was filed. App. 92-98.

Reversing the Ninth Circuit's judgment here would not, as respondents (at 4) and their *amici* (NAM Br. 4, 26-28) speculate, discourage "employers from offering . . . benefit plans in the first place." *Varity Corp. v. Howe*, 516 U.S. 489, 497 (1996). Respondents and their *amici* concede the central premises of petitioners' and the United States' position: ERISA's duty of prudence entails an "ongoing" (Resp. Br. 3) and "rigorous" (NAM Br. 5) duty to monitor existing investments, and a violation of that duty within the limitations period gives rise to a timely claim even if the investment option in question was first selected outside of that period (Resp. Br. 2). Enforcing a duty acknowledged by respondents and their employer *amici* to exist cannot possibly pose any significant risk to the availability of retirement plans.[7] Moreover, neither respondents nor their *amici* offer any evidence that litigation challenging the prudence of investment options offered by ERISA plans has caused employers to abandon or decline to establish those plans. *See* AARP Br. 20-23.

Respondents (at 45-47) and their *amici* (NAM Br. 10-14) are not helped by characterizing ERISA's limitations provision as a statute of repose and invoking the policies underlying such provisions. As *amici* ultimately acknowledge (NAM Br. 11 n.2), the characterization of § 1113 as a statute of repose or a

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[7] For similar reasons, NAM's characterization (at 31) of the United States' brief as "inappropriate" "regulation by litigation" is unfounded. This Court requested the United States' views at the certiorari stage, and the Secretary of Labor has primary authority to administer the statute, *see* 29 U.S.C. § 1135; *see also Talk Am., Inc. v. Michigan Bell Tel. Co.*, 131 S. Ct. 2254, 2257 n.1 (2011) (U.S. *amicus* brief represents agency's views). The Secretary's views on the meaning of a statute he administers should be given weight. *See Kasten v. Saint-Gobain Performance Plastics Corp.*, 131 S. Ct. 1325, 1335 (2011).

statute of limitations does not matter in this case. No one contends that § 1113(1)'s six-year period begins to run before the "breach or violation" on which the action is based, and petitioners seek to recover for breaches occurring within that period. Respondents have no claim to "repose" for conduct occurring within six years of petitioners' suit.[8]

D. Respondents Mischaracterize The Proceedings Below

Respondents erroneously assert that the district court allowed petitioners to prove imprudent monitoring during the limitations period without restriction and that the district court simply rejected petitioners' evidence at trial as a matter of fact. *See, e.g.*, Resp. Br. i, 1, 14, 26-27, 42. All parties and the courts below understood the district court's summary judgment ruling to preclude petitioners from pursuing claims relating to the three funds initially selected as investment options in 1999, unless petitioners could prove that those funds had experienced such significant changes that retaining them was equivalent to choosing a new investment within the limitations period.

Respondents' contrary assertion presupposes that petitioners voluntarily restricted themselves to a changed-circumstances theory, then litigated an irrelevant limitations question before the court of appeals and this Court, and that both courts unnecessarily agreed to adjudicate that limitations issue. Respondents' far-fetched supposition is contradicted

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[8] Moreover, § 1113 is unlike the provisions described by this Court as statutes of repose because it provides for tolling "in the case of fraud or concealment," 29 U.S.C. § 1113; consequently, the six-year period is not measured solely "from the date of the last culpable act or omission of the defendant," *CTS Corp. v. Waldburger*, 134 S. Ct. 2175, 2182 (2014).

by the record and by respondents' own arguments throughout the litigation.

1. The judgment under review is the Ninth Circuit's. In that court, all parties agreed that the district court's summary judgment order precluded petitioners from pursuing claims relating to the 1999 funds unless they proved changed circumstances necessitating a full diligence review. Respondents argued that "[t]he district court correctly held that ERISA's six-year limitations period bars challenges to funds added to the Plan more than six years before this action was filed. Plan fiduciaries do have a continuing duty under ERISA to monitor investment options for changed circumstances rendering a once-prudent investment now imprudent, but plaintiffs here allege no changed circumstances." Second Br. on Cross-Appeal 18 (July 25, 2011). The court of appeals likewise recognized that the district court's summary judgment ruling "determined that ERISA's limitations period barred recovery for claims arising out of investments included in the Plan more than six years before beneficiaries had initiated suit." App. 15. The court of appeals affirmed that ruling, "hold[ing] that the act of designating an investment for inclusion starts the six-year period under section 413(1)(A) for claims asserting imprudence in the design of the plan menu." App. 17. The court of appeals stated that the district court was "correct" to allow a claim of "changed circumstances engendering a new breach," but affirmed the district court's summary judgment ruling that precluded any other claim. App. 19. The court of appeals' holding and analysis of the limitations issue would have been entirely unnecessary if, as respondents assert, petitioners' claims had failed at trial on factual grounds.

The district court record likewise does not support respondents' newfound position. The court granted partial summary judgment to respondents on their statute-of-limitations defense, ruling that petitioners' claims relating to funds selected for inclusion in the plan more than six years before the complaint was filed were time-barred. The court stated that, because "the initial decision to add retail mutual funds, including the sector funds, as an option in the Plan was made in 1999 and 2000," "the prudence claims arising out of these decisions are barred by the statute of limitations." App. 262-63. The court's reasoning foreclosed claims challenging the prudence of respondents' monitoring of those investment options during the limitations period. The court cited *Phillips v. Alaska Hotel & Restaurant Employees Pension Fund*, 944 F.2d 509 (9th Cir. 1991), for the proposition that, when an initial breach occurs before the limitations period, claims arising out of subsequent breaches related to the original breach are untimely. App. 180 ("[A]lthough the trustee's conduct could be viewed as a series of breaches, the statute of limitations did not begin anew because each breach was 'of the same character.'") (quoting *Phillips*, 944 F.2d at 520).

All parties understood the district court's ruling to mean that petitioners could pursue claims relating to the 1999 funds only to the extent that significant changed circumstances had occurred during the limitations period such that retaining those funds could be considered equivalent to a decision to add a new fund. Accordingly, petitioners' expert's pre-trial declaration asserted that, in light of changed circumstances, the three funds added in 1999 should be treated as ones added within the limitations period. *See* Dkt. 354, ¶¶ 24 & n.16, 30(a), 31(a). Not once

during the trial did respondents or the court suggest that petitioners were permitted to assert a broader claim.[9] At the end of the trial, the court provided for post-trial submissions on the funds added in 1999, but only on the argument that name changes by those three funds within the limitations period constituted sufficiently significant changes to warrant a review of the share classes. *See* App. 68; 10/22/09 Vol. I Tr. 5:22-6:13, 9:2-15.

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[9] Early in the trial, respondents' counsel acknowledged that petitioners' expert "believe[d] himself precluded by the court's earlier rulings and ha[d] not made the argument that [respondents] should have switched out of existing funds," 10/20/09 Vol. I Tr. 27:17-20; in other words, counsel recognized that the expert understood the summary judgment ruling to mean that § 1113(1) barred a claim that respondents breached a duty to review and remove the imprudent retail-class shares. Petitioners' counsel and the district court acquiesced in that understanding. *See* 10/20/09 Vol. I Tr. 27:21-22 ("THE COURT: Is that your understanding? MR. WOLFF: Yes, Your Honor. THE COURT: Okay.").

Respondents' erroneous assertion (at 15-16) that the district court "all but invited" petitioners to re-assert their imprudent-monitoring theory (notwithstanding the summary judgment ruling barring that theory) rests on a mischaracterization of a brief exchange between the court and petitioners' expert. The court asked for "clarification" from petitioners' expert regarding the scope of his opinion. JA188. The witness focused his answers on the changed-circumstances theory, but also stated his opinion that prudence requires periodic review "with some frequency." JA 189. In context, that brief exchange indicates that the court sought to determine whether the expert's testimony was consistent with the court's statute-of-limitations ruling; it was not inviting the expert to advance a theory inconsistent with that ruling. The court offered no guidance about the claims that petitioners were legally permitted to bring; nor did it suggest that petitioners could pursue a claim for imprudent periodic monitoring without proving significant changed circumstances.

In post-trial briefing, respondents confirmed their understanding that the summary judgment ruling barred petitioners' monitoring claims. Respondents argued that, "[b]y challenging the prudence of *maintaining* retail share classes of the three . . . funds [added in 1999], plaintiffs have done what the Court has forbidden, by attempting to resurrect claims that were properly held barred by the six-year statute of limitations." Dkt. 381, at 13 (emphasis added).

In sum, the district court's summary judgment ruling on timeliness generally barred all claims regarding investments added before the limitations period, including claims that respondents engaged in imprudent monitoring. To attempt to revive their claims involving investments added in 1999, petitioners were forced to characterize the funds as new investments added within the limitations period and to claim that the funds experienced significant changes in circumstances that should have triggered a full due diligence review. As to the 1999 funds, the district court's post-trial ruling thus did not rule generally on claims for fiduciary breaches within the limitations period, but only on the more limited changed-circumstances theory.

2. Respondents' fundamental mischaracterization of the record infects many of their arguments. First, respondents express their arguments as defenses of factual findings by the district court, which would be reviewed only for clear error. For example, respondents argue that "the district court did not err in rejecting petitioners' trial claim that respondents acted imprudently in monitoring and retaining the challenged funds." Br. 39 (capitalization omitted). *See also* Br. 29 ("The district court did not clearly err in finding that respondents acted

prudently . . . .") (capitalization omitted). But, as shown above, the district court barred the claims at issue here as a matter of law at summary judgment. The district court did not find, as respondents claim (at 40), that they "engaged in a state-of-the-art monitoring process." Whether respondents' monitoring lived up to a standard of reasonable prudence remains a disputed issue of fact because the district court granted summary judgment on limitations grounds.

Second, respondents' misconception that the district court rejected on factual grounds any claims for imprudent monitoring leads them to assume incorrectly that petitioners are actually challenging the initial decision to invest in the challenged funds. Respondents therefore argue that challenges to that initial decision are untimely. *See* Br. 45-47 (arguing that § 1113(1) bars challenges to initial decision); *id.* at 43-45 (arguing that challenge to initial decision cannot be maintained on a "continuing violation theory"). But petitioners made abundantly clear that their claims "derive not from the imprudent *addition* of the retail-class shares outside the limitations period but from the imprudent *management* of the plan during the limitations period." Pet. Br. 2.[10] Those claims do not turn on the prudence of initially selecting the retail-class shares, but rather on respondents' prudence in reviewing and maintaining the retail-class shares during the limitations period.

3. Assessed under the proper legal standards, petitioners' evidence establishes breaches of the duty of prudence or, at a minimum, the existence of a

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[10] *See* First Brief on Cross-Appeal at 20 (Apr. 20, 2011) ("Defendants are liable for the losses to the Plan caused by their breach of duty in keeping these funds in the Plan in the six years before commencement of this action.").

genuine issue of material fact regarding respondents' compliance with ERISA. The district court found after a bench trial that respondents breached their duty of prudence when they selected retail-class shares of three funds in 2002 when lower-cost institutional-class shares of the same funds were available. App. 130. The Ninth Circuit affirmed that conclusion, App. 64, and respondents did not seek further review. If not dispositive, that analysis is highly probative of respondents' prudence in retaining retail-class shares of the three 1999 funds. As with the 2002 funds, the 1999 funds offered institutional-class shares, which provided the same investments as the retail-class shares, but with lower expenses. Pet. Br. 39-41. From the time respondents added the three funds in 1999 to the time petitioners filed suit in 2007, respondents did not once consider switching to institutional-class shares. *Id.* Given that respondents undisputedly never considered whether to switch from retail-class shares to institutional-class shares that were guaranteed to provide better performance net of fees, petitioners are at least entitled to a trial on whether respondents' monitoring was prudent.

Respondents protest (at 30) that "institutional-class shares are not categorically superior to retail-class shares for all 401(k) plans in all circumstances." That assertion does not help respondents, because they offer no reason why institutional-class shares were not superior to retail-class shares for this plan in these circumstances. Respondents (at 30-31) and their *amici* (SIFMA Br. 11-17) suggest that, in some plans, retail-class shares are justified by revenue-sharing payments that benefit participants. Even if that were true in some cases, the plan sponsors in this case agreed to bear administrative costs, so

participants did not benefit from revenue sharing[11]; respondents accordingly do not justify their conduct on that basis. *See* Resp. Br. 31 n.8. Respondents also observe that, in 1999, the retail-class shares of one of the funds had a "Morningstar rating" and "a significant performance history," whereas the corresponding institutional-class shares did not. Br. 11-12, 30-31.[12] But respondents do not explain why a Morningstar rating would justify offering retail-class shares over institutional-class shares of the same fund that are guaranteed to have better net performance. Plus, respondents offer no excuse for retaining the retail-class shares during the limitations period once the institutional-class shares gained a Morningstar rating and a significant performance history.[13]

II. RESPONDENTS' ASSERTION THAT THE WRIT SHOULD BE DISMISSED AS IMPROVIDENTLY GRANTED LACKS MERIT

Respondents' attempt to avoid a decision on the question presented – a question formulated by this Court (JA241) based on the United States' invitation brief – should be rejected. Respondents forfeited their objections to this Court's consideration of the question presented by failing to raise them before

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[11] Edison, however, did benefit from revenue sharing, which "offset the cost of . . . record-keeping expenses" that Edison otherwise would have paid itself. App. 78.

[12] Morningstar rates mutual funds based on historic returns, but requires at least three years of performance history to issue a rating. *See* 10/20/09 Vol. II Tr. 5:17-21. The institutional-class shares of the Franklin fund lacked a Morningstar rating in 1999 because they were first offered in 1997 and so lacked the requisite performance history. App. 96.

[13] *See* 10/20/09 Vol. II Tr. 6:3-7; 27:23-28:2.

now, and no barrier exists to this Court's review of that question in any event.

A. Respondents waived their objections to the Court's review by failing in the brief in opposition to identify "any perceived misstatement made in the petition" or nonjurisdictional "objection to consideration of a question presented based on what occurred in the proceedings below." Sup. Ct. R. 15.2. The certiorari petition challenged the Ninth Circuit's affirmance of the district court's summary judgment ruling that claims involving the 1999 funds were time-barred, absent proof of changed circumstances. *See* Pet. 12-14. In opposing certiorari, respondents agreed with petitioners' characterization of the lower courts' holdings: "the court [of appeals] . . . affirmed the district court's conclusion that ERISA's six-year statute of limitations bars any claims based on funds added to the Plan more than six years before the filing of the complaint." Opp. 6. Respondents argued that no circuit conflict existed, Opp. 7-10, and that the court of appeals' decision was correct, Opp. 11-15. The United States filed an invitation brief recommending review of the limitations question, framed in terms that this Court subsequently adopted. *Compare* U.S. Inv. Br. I *with* JA241. Respondents filed a supplemental brief again opposing certiorari based on the supposed lack of a circuit split, Supp. Opp. 1-4, and the correctness of the decision below, *id.* at 4-7; that brief also attempted to rebut a policy argument in favor of certiorari, *id.* at 7-9. Respondents neither made any procedural objection to certiorari nor raised a vehicle problem in their brief in opposition or supplemental brief. The Court should therefore "deem[]" respondents' new objection to certiorari "waived." Sup. Ct. R. 15.2.

Even if hints of respondents' current objection to certiorari can be discerned in their certiorari briefing, respondents have offered no "clear justification for now embracing an argument '[the Court] necessarily considered and rejected' in granting certiorari." *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 670 n.2 (2010) (quoting *United States v. Williams*, 504 U.S. 36, 40 (1992)). Respondents identify no new development since the Court granted certiorari that affects the Court's ability to decide the question presented.

Moreover, respondents failed to advance their current interpretation of the district court proceedings before the Ninth Circuit. There, petitioners argued that § 1113(1) bars claims "only as to breaches that occurred more than six years earlier, but not as to the breaches within six years." First Br. on Cross-Appeal 19. In response, respondents argued only that the statute of limitations precluded such claims, not that the district court had resolved those claims against petitioners as a matter of fact. *See* Second Br. on Cross-Appeal 22-28.

B. In any event, respondents' argument turns on their mischaracterization of the proceedings below. The Ninth Circuit affirmed the district court's summary judgment ruling, which precluded petitioners from pursuing at trial claims that respondents had failed prudently to review and remove investments within the limitations period and instead required proof of changed circumstances sufficient to treat retaining retail-class shares like the decision to add a new investment. *See supra* Part I.D.1. This appeal squarely presents the correctness of that legal conclusion, not "a factbound dispute concerning the sufficiency of the evidence petitioners introduced at trial." Resp. Br. 25.

Indeed, although respondents initially suggest that there is no legal dispute between the parties, they ultimately *defend* the lower courts' reasoning. Respondents argue (at 33) that they committed no breach within the limitations period because, "[o]nce investments are selected, a fiduciary must monitor only for significant changes in the value and risks of the investments." They also endorse (at 44) the Ninth Circuit's conclusion that, under § 1113(1), only a showing of "changed circumstances" would permit petitioners to pursue a timely claim relating to existing investment options. Thus, a live dispute remains regarding the governing legal standards, and the Court's resolution of that dispute will determine whether petitioners will ever be able to litigate their imprudent-monitoring claims with respect to the three 1999 funds.

CONCLUSION

The judgment of the court of appeals should be reversed and the case remanded.

Respectfully submitted,

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February 13, 2015

SUPPLEMENTAL BRIEF

No. 13–550

IN THE
Supreme Court of the United States

GLENN TIBBLE, ET AL.,

Petitioners,

v.

EDISON INTERNATIONAL, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

SUPPLEMENTAL BRIEF FOR PETITIONERS

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Petitioners submit this supplemental brief under Rule 15.8 to apprise the Court of a recent circuit decision, *Fuller v. SunTrust Banks, Inc.*, ___ F.3d ___, No. 12-16217, 2014 U.S. App. LEXIS 3610 (11th Cir. Feb. 26, 2014), that deepens the circuit split on the first question presented in the petition, as to whether ERISA's statute of limitations immunizes the use of imprudent 401(k) plan investments if the fiduciaries initially selected the funds more than six years prior to suit. See Pet. i, 16–26; Reply 1–8. The deepening of this split underscores the need for this Court's review.

Fuller affirmed the dismissal, based on ERISA's six-year limitations period,[1] of claims that fiduciaries of the SunTrust 401(k) plan breached their duties of prudence and loyalty by selecting excessively costly and poorly-performing SunTrust-affiliated mutual funds for the plan, and then repeatedly failing to remove or replace them. *Fuller*, 2014 U.S. App. LEXIS 3610, *7, *8–9. The fiduciaries added the challenged funds to the plan in 1997 and 2002, and the plaintiff filed her action over six years later, in 2011. *Id.* *3, *4–5. The district court originally rejected the six-year limitations argument, *id.* *4–5, relying on the Second Circuit's decision in *Morrissey* to conclude that the defendants' "duties of loyalty and prudence ... did not end upon selecting the funds", because "[c]ourts have widely recognized an ERISA fiduciary's ongoing duty to monitor investments and remove investments that are no longer viable." *Fuller v. SunTrust Banks, Inc.*, No. 11-784, 2012 U.S. Dist. LEXIS 56602, *32–33 (N.D. Ga. Mar. 20, 2012) (citing *Morrissey v. Curran*, 567 F.2d 546, 548–49 n.9

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[1] 29 U.S.C. §1113(1).

(2d Cir. 1977), among other cases). However, after the Ninth Circuit's decision below and *David v. Alphin*, 704 F.3d 327 (4th Cir. 2013), the district court reversed course on the six-year limitations issue. *Fuller*, 2014 U.S. App. LEXIS 3610, *18–21.

On appeal, the Eleventh Circuit agreed with the Ninth Circuit that, in the absence of "changed circumstances", characterizing the failures to remove the SunTrust funds as separate violations would undermine the purpose of the six-year limitations period. *Id.* *44–45. (citing *Tibble v. Edison Int'l*, 729 F.3d 1110, 1120 (9th Cir. 2013)); see Pet. App. 18–19. And as in *David*, given that Fuller had not alleged such changed circumstances, the court "decline[d] to decide whether the Committee Defendants had an ongoing duty to remove imprudent investment options from the Plan in the absence of a material change in circumstances." *Fuller*, 2014 U.S. App. LEXIS 3610, *43–44 (citing *David*, 704 F.3d at 341).

In reaching its conclusion, the Eleventh Circuit attempted to distinguish *Martin v. Consultants & Administrators, Inc.*, 966 F.2d 1078, 1087–88 (7th Cir. 1992), as involving a repeated breach arising from a distinct transaction when a new contract was signed. *Fuller*, 2014 U.S. App. LEXIS 3610, *42–43. The Eleventh Circuit's purported distinction overlooks the basis of the Seventh Circuit's decision—"the continuing nature of a trustee's duty under ERISA to review plan investments and eliminate imprudent ones." *Consultants*, 966 F.2d at 1087–88 (citing 29 U.S.C. §1104(a)(1)(B) and *Morrissey*, 567 F.2d at 549 n.9). As *Morrissey* explained, ERISA imported a trustee's common-law duty "to dispose of improper investments within a reasonable time[.]" 567 F.2d at 548–49 and n.9. As with the Ninth Circuit decision

below, the Eleventh Circuit eliminated that duty by finding that the failure to dispose of improper investments was not a "cognizable breach[.]" *Fuller*, 2014 U.S. App. LEXIS 3610, *41, *43; Reply 2.

Fuller deepens the circuit split as to the first question presented by the petition and further demonstrates the devastating effects of the decision below in depriving workers of their ability to seek judicial redress for disloyally or imprudently managed retirement plans as Congress intended. Given the dominant role of defined contribution plans in American workers' retirement portfolios, the proper interpretation of §1113(1) has enormous economic significance. Pet. 5–6; Reply 8. The petition should be granted.

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SUPPLEMENTAL BRIEF

No. 13-550

IN THE

Supreme Court of the United States

GLENN TIBBLE, ET AL.,

Petitioners,

v.

EDISON INTERNATIONAL, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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For the reasons explained in respondents' brief in opposition, neither question presented in the petition for certiorari merits review. The Solicitor General's invitation brief adds very little to that analysis.

The Solicitor General agrees that review is not warranted on the deference question, for the reasons already stated by respondents: there is no circuit conflict on the issue of deference as it is presented in this case (SG Br. 21-23); the Ninth Circuit correctly resolved the issue as it arises here (*id.* at 17-18); and the distinct deference question petitioners seek to raise is not properly presented here (*id.* at 20-21).

The Solicitor General does contend that review is warranted on the limitations question, but he says almost nothing petitioners have not already said, and he is wrong for the same reasons petitioners are wrong. The Solicitor General proposes one new analogy to the common law of trusts, but that analogy does not support his position. *See infra* at 4-5. Importantly, the Solicitor General makes no claim to any level of deference toward the Department of Labor's views on the limitations question, and none is warranted. Certiorari should (still) be denied.

1. The Solicitor General's argument for review of the limitations issue rests primarily on his assertion that the decision below "conflicts with the decisions of other courts of appeals." SG Br. 7. That assertion borders on frivolous.

The Fourth, Ninth, and Eleventh Circuits have all held that a claim challenging the selection of mutual funds for a 401(k) plan lineup is barred by the six-year limitations period of ERISA § 413(1)(A), 29 U.S.C. § 1113(1)(A), *if* the claim challenges funds that were selected more than six years before the

claim was filed, and the claim does *not* allege that any materially new circumstances arose within the previous six years that required removal of the funds. *See Fuller v. Suntrust Banks, Inc.*, 744 F.3d 685, 700-02 (11th Cir. 2014); *David v. Alphin*, 704 F.3d 327, 331-32 (4th Cir. 2013); Pet. App. 17-19. Multiple district court decisions agree. *See, e.g.*, *Kanawi v. Bechtel Corp.*, 590 F. Supp. 2d 1213, 1225 (N.D. Cal. 2008); *Stargel v. SunTrust Banks, Inc.*, 968 F. Supp. 2d 1215, 1230 (N.D. Ga. 2013); *see also Biglands v. Raytheon Emp. Sav. & Inv. Plan*, 801 F. Supp. 2d 781, 788-89 (N.D. Ind. 2011); *Angell v. John Hancock Life Ins. Co.*, 421 F. Supp. 2d 1168, 1175 (E.D. Mo. 2006). No circuit has reached a contrary conclusion on the application of § 413(1)(A), and the Solicitor General does not suggest otherwise.

The Solicitor General instead asserts the same non-conflict asserted by petitioners, relying on two decades-old decisions standing for the unexceptionable proposition that ERISA fiduciaries have an ongoing duty to monitor investments and remove options that become imprudent. *See* SG Br. 15 (citing *Martin v. Consultants & Administrators, Inc.*, 966 F.2d 1078, 1087-88 (7th Cir. 1992); and *Morrissey v. Curran*, 567 F.2d 546, 548-49 & n.9 (2d Cir. 1977)). As respondents have already explained, *nobody disagrees with that rule*—not respondents, not the district or appellate courts in this case, and not the circuits that agree with them. Opp. 8-9. Indeed, the district court here specifically found that Edison *did* monitor all 401(k) investment options on a monthly, quarterly, annual, and as-needed basis, ensuring that all investment options continued to meet the "Investment Criteria" for the Plan, including with respect to performance on a net-of-fee basis.

Pet. App. 75-77.[1] Neither *Martin* or *Morrissey* required respondents to do more than that. Opp. 9-11.

To the contrary, the court in *Morrissey*—which is not even a limitations case, and thus on its face does not present the kind of "conflict" that normally justifies certiorari (Opp. 8)—simply held that plaintiffs were entitled to factfinding into whether the fiduciary should have liquidated an investment *given the lack of return over several years.* 567 F.2d at 548-49 & n.7. In other words, the court allowed the plaintiffs to challenge not the original decision itself to invest, but the failure to monitor and react when the investment did not perform. Far from disagreeing with *Morrissey*, the district court here permitted petitioners to litigate exactly that kind of claim, authorizing discovery and a full trial into whether respondents failed to react to any material new information during the limitations period that required removal of the challenged funds. Petitioners were unable to identify any such failure. Opp. 9-10.

Martin also supports the decision below. *Martin* involved claims challenging the fiduciaries' bidding and monitoring practices under two different contracts, one awarded for 1984 and the other for 1987. 966 F.2d at 1087. The Seventh Circuit found the claims involving bidding activities for the 1987 con-

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[1] The district court further explained the monitoring process: "If an investment option's performance or a change in management or deterioration in financial condition suggests that the option may cease to meet the Investment Criteria in the future, the Investments Staff places the fund on a 'Watch List' for closer monitoring. If an option on the Watch List fails to meet the Investment Criteria, the Investments Staff will recommend to the Investment Committees that the option be removed from the Plan line-up." Pet. App. 76-77.

tract to be timely, but barred the claims involving bidding activities for the 1984 contract. Despite the fiduciaries' similar bidding procedures for both contracts, the 1987 contract (and the bidding conduct associated with it) constituted a "new transaction and a distinct violation" within the limitations period, making that claim timely. *Id.* The same result obtains here: the challenges to the three funds added before 2001 are barred, but the challenges to funds added after 2001 survive.[2]

2. For the same reasons, the decision below is not only consistent with *Martin* and *Morrissey*, it is correctly decided, contrary to the Solicitor General's submission. The premise of the Solicitor General's argument is that an ERISA fiduciary has an ongoing duty to constantly revisit and reconsider all prior decisions, no matter how long-settled, and even if there are no changed circumstances that warrant new action. SG Br. 12 n.4. The Solicitor General cites no authority supporting such an unbounded conception of a fiduciary's duty. Under trust law, which the Solicitor General cites by analogy, the duty to divest arises when "owing to a subsequent *change of circumstances* the investment is no longer a proper investment." Restatement (Second) of Trusts § 231, at 550 (1959) (emphasis added); *see id.* at 551 (when bonds "become speculative owing to a *change in circumstances*," trustee must dispose of them within reasonable time (emphasis added)); *id.* (when mortgage loses value "owing to a *change in the character* of the neighborhood," trustee must foreclose (empha-

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[2] The Seventh Circuit in *Martin*, like courts below in this case, also permitted claims challenging monitoring practices during the limitations period. 966 F.2d at 1089.

sis added)). Trust law is thus consistent with—not contrary to—the decisions below, which enforced respondents' duty to monitor by allowing petitioners to try to prove that changed circumstances required respondents to remove funds added before 2001. Petitioners could not make that showing. Given the lack of any material change in circumstances, petitioners necessarily were alleging only that the *initial decision* to include the funds was itself a fiduciary breach. *See David*, 604 F.3d at 341 ("It is, at its core, simply another challenge to the initial selection of the funds to begin with."). And because the "last action" that constituted part of *that* alleged breach occurred in 1999, their claim was properly held to be time-barred under the plain language of ERISA § 413(1)(A), 29 U.S.C. § 1113(1)(A).

3. The Solicitor General comes close to acknowledging that petitioners' claims cannot survive under § 413(1)(A), the only limitations bar actually addressed by the decision below. "At a minimum," the Solicitor General urges (SG Br. 11), the claims should be deemed timely under the distinct language of § 413(1)(*B*), which governs claims of *omissions* and provides a limitations period of six years from the "latest date on which the fiduciary could have cured the breach or violation." 29 U.S.C. § 1113(1)(B).

There are at least two flaws in that position. First, it would render § 413(1)(A) superfluous, because on the Solicitor General's unbounded view of the duty of ongoing prudence, *any* failure to correct *any* earlier imprudent act could be reframed as a claim that the fiduciary "omitted" to "cure" the violation.

Second, the "omission" theory was not adequately

pressed or passed on below. The language the government quotes (SG Br. 11) is the only place in petitioners' opening brief below that suggested that the omissions language of § 413(1)(B) might apply—and the relevant sentence is simply a conclusory assertion that both § 413(1)(A) and (B) are satisfied. C.A. Dkt. 14, at 16 ("[T]he 'last action which constituted a part of the breach'—using retail class shares—occurred within six years and the 'latest date on which the fiduciary could have cured the breach'—replacing retail with institutional shares—also occurred within six years." (quotations omitted)). When petitioners actually developed their argument, and sought to distinguish the adverse precedents, they focused only on what qualified as the "last action" under § 413(1)(A), not on the date when an omission could have been "cured" under § 413(1)(B). C.A. Dkt. 14, at 18 ("the six-year limitation period starts on *the last date of the acts* constituting the breach" (emphasis added)); *id.* ("In addition to *the last-date focus* of ERISA's six-year limitation period, ERISA imposes a continuing duty upon plan fiduciaries to discharge their duties to the plan loyally and prudently." (emphasis added)).

The court of appeals clearly understood the gravamen of petitioners' argument and treated it as invoking only the § 413(1)(A) period applicable to affirmative *acts*, rather than the § 413(1)(B) period governing alleged *omissions*. *E.g.*, Pet. App. 17 (summarizing petitioners' argument: "Because fiduciary duties are ongoing, and because section 413(1)(A) speaks of the '*last* action' that constitutes the breach, these claims are said to be timely for as long as the underlying investments remain in the plan."). The court of appeals distinguished the case

before it from cases involving alleged omissions, Pet. App. 18, and explicitly limited its holding to the § 413(1)(A) limitations period, Pet. App. 17 ("Today we hold that the act of designating an investment for inclusion starts the six-year period under section 413(1)(A) ").

As the Solicitor General argues with respect to the deference question, review generally is not appropriate for an issue "only minimally briefed below." SG Br. 7. An omission case governed by § 413(1)(B) does not necessarily raise the same issues as an affirmative act case governed by § 413(1)(A)—in particular, a fiduciary's duty to revisit and unwind some prior act, once settled and relied upon, may well differ from the duty to avoid taking the action in the first place. If and when the lower courts reach conflicting results in cases clearly articulating omission claims, this Court can grant review to decide the scope of the limitations period that governs them. Now is not the time, and this is not the case, to address that undeveloped issue.

4. Finally, the Solicitor General recommends certiorari on the policy ground that the unanimous reading of the statute among circuit decisions "fails to protect plan participants' retirement savings" (SG Br. 13) and threatens their "security and integrity" (*id.* at 16). Given that courts began rejecting "continuous violation" theories under ERISA as early as 1991, *see, e.g.*, *Phillips v. Alaska Hotel & Rest. Emps. Pension Fund*, 944 F.2d 509, 520 (9th Cir. 1991),[3]

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[3] The Solicitor General seeks to distinguish *Phillips* (SG Br. 13) on the ground that it involved the three-year limitations period of ERISA § 413(2), which applies when the plaintiff has "actual knowledge" of the breach. 29 U.S.C. § 1113(2). But so did *Martin*, which the Solicitor General considers to be on

one would expect substantial empirical support for such an ominous warning from the government—evidence of fiduciary abuse would be rampant, and the nation's 401(k) plans would be filled with imprudent investment options. There is no such evidence, because the premise makes no sense.

According to the Solicitor General, retirement savings are at risk under the decision below because it "effectively exempt[s] ERISA fiduciaries from their statutorily-mandated, ongoing duty of prudence" (SG Br. 16) and eliminates their "incentive to monitor and update plan investments" (*id.* at 13). That assertion reflects the same mistake that underlies the false conflict invoked by the Solicitor General: the consensus rule adopted by the Ninth Circuit in no way exempts fiduciaries from their duty to monitor and update investments, because fiduciaries always must identify and respond to developments that cause investments to become imprudent. Nothing in *Tibble* or *David* or *Fuller* permits a fiduciary to simply ignore an investment once it remains in the plan for six years.

The Solicitor General also inexplicably assumes that a fiduciary would simply refuse to remove or change an unsound investment, once its unsoundness is brought to the fiduciary's attention. The Solicitor General again cites nothing indicating such a problem exists. This case itself certainly does not

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point. *See* 966 F.2d at 1087-88. What matters about *Phillips* is its focus on when a new cause of action accrues under ERISA: while a "continuous series of breaches may allow a plaintiff to argue that a new cause of action accrues with each new breach," that theory does not apply to breaches that "are of the same kind and nature." 944 F.2d at 520.

suggest any such threat to the retirement funds of America's workers. The three funds that remain at issue here were removed from the Plan years ago, and the amount at stake is a tiny fraction of the billions the Plan has under management. In 2010, petitioners' own expert calculated that the compounded damages for those three funds was approximately $463,000 *total for the entire class*. D.Ct. Dkt. 402-2 Exs. C, G & H. And the district court specifically found as a matter of fact that Edison fulfilled its duty of loyalty to all Plan participants (Pet. App. 123-25), and that Edison's selection of a few imprudent share classes among the numerous funds selected for the Plan was an unintentional "oversight" that did not demonstrate any bad faith (D.Ct. Dkt. 448 at 8). There is nothing here warranting further review.

CONCLUSION

For the foregoing reasons, and for the reasons previously stated, the petition for a writ of certiorari should be denied.

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AMICUS CURIAE BRIEF

No. 13-550

In the Supreme Court of the United States

GLENN TIBBLE, ET AL., PETITIONERS

v.

EDISON INTERNATIONAL, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

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QUESTION PRESENTED

The Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1001 *et seq.*, imposes a duty on fiduciaries of an employee benefit plan to administer the plan prudently. 29 U.S.C. 1104(a). Plan participants and beneficiaries and the Secretary of Labor may sue on behalf of the plan to remedy a breach of fiduciary duty. 29 U.S.C. 1109, 1132(a)(2). A claim for breach of fiduciary duty must be brought within six years of "(A) the date of the last action which constituted a part of the breach or violation, or (B) in the case of an omission the latest date on which the fiduciary could have cured the breach or violation," 29 U.S.C. 1113(1), unless the plaintiff had actual knowledge of the breach, 29 U.S.C. 1113(2), or there was fraud or concealment of the breach, 29 U.S.C. 1113. The question presented is:

Whether a claim that ERISA plan fiduciaries breached their duty of prudence by offering higher-cost retail-class mutual funds to plan participants, even though identical lower-cost institutional-class mutual funds were available, is barred by 29 U.S.C. 1113(1) when fiduciaries initially chose the higher-cost mutual funds as plan investments more than six years before the claim was filed.

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In the Supreme Court of the United States

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ON WRIT OF CERTIORARI
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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORING PETITIONERS

INTEREST OF THE UNITED STATES

This case concerns the timeliness of claims for breach of fiduciary duty under the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1001 *et seq.* The Secretary of Labor has primary authority for administering Title I of ERISA. At the Court's invitation, the United States filed a brief as amicus curiae at the petition stage of this case.

STATEMENT

1. ERISA "protect[s] * * * the interests of participants in employee benefit plans and their beneficiaries" by "establishing standards of conduct, responsibility, and obligation for fiduciaries of [those] plans." 29 U.S.C. 1001(b). In particular, ERISA imposes the trust-law duties of loyalty and prudence on plan fiduciaries. 29 U.S.C. 1104(a)(1). The fiduciaries

must act "solely in the interest of the participants and beneficiaries" and "for the exclusive purpose" of providing benefits and defraying reasonable plan expenses. 29 U.S.C. 1104(a)(1)(A). They also must discharge their responsibilities "with the care, skill, prudence, and diligence" that a prudent person "acting in a like capacity and familiar with such matters" would use. 29 U.S.C. 1104(a)(1)(B); see *Fifth Third Bancorp* v. *Dudenhoeffer*, 134 S. Ct. 2459, 2463, 2467 (2014).

A plan participant, beneficiary, or fiduciary, or the Secretary, may sue on behalf of the plan to remedy a breach of fiduciary duty. 29 U.S.C. 1132(a)(2). Fiduciaries are personally liable for such breaches. 29 U.S.C. 1109. With exceptions not applicable here (see note 4, *infra*), an action for breach of fiduciary duty must be brought within six years of "(A) the date of the last action which constituted a part of the breach or violation, or (B) in the case of an omission the latest date on which the fiduciary could have cured the breach or violation." 29 U.S.C. 1113(1).

2. a. Respondent Edison International is a holding company for electric utilities and energy interests (collectively, Edison). Pet. App. 13. Petitioners are current or former employees of Edison and participants in the Edison 401(k) Savings Plan (the Plan), which serves approximately 20,000 employees. *Id.* at 12-14, 70, 105.

The Plan is a defined-contribution plan under ERISA, meaning that participants are entitled to the value of their own investment accounts, rather than any specific benefit amount. Pet. App. 13; see 29 U.S.C. 1002(34). The value of each participant's account depends upon the participant's and employer's

contributions and the investments' market performance, minus expenses. Pet. App. 13; see *LaRue* v. *DeWolff, Boberg & Assocs., Inc.*, 552 U.S. 248, 250 n.1 (2008).

Respondent Southern California Edison Benefits Committee (Benefits Committee) is the plan administrator, and respondents Edison International Trust Investment Committee and Trust Investment Subcommittee (collectively, the Investment Committees) choose the plan investments that will be made available to participants. Pet. App. 167, 169-170. Participants in turn choose their investments from the menu of funds selected by the Investment Committees. *Id.* at 72-73. The Investment Committees "have the authority to decide whether to select, maintain or replace the investment options in the Plan." *Id.* at 74. During the time period at issue, they met quarterly to review plan investments. *Id.* at 74-75. At those meetings, they received reports and recommendations from investment staff and decided whether to remove, replace, or add funds. *Ibid.*; *id.* at 77; see J.A. 120-121, 125-126. The members of the Investment Committees are plan fiduciaries. Pet. App. 72.

Since 1999, plan participants have been able to choose from a variety of investment options, including approximately 40 mutual funds. Pet. App. 13-14. For six mutual funds, the Investment Committees selected retail-class funds as plan investments, even though lower-cost institutional-class versions of the funds were available. *Id.* at 14, 83-84. Aside from the fees charged, the retail-class funds and institutional-class funds were identical: they invested in the same securities and were overseen by the same managers. *Id.* at 61, 84. The fees were collected out of mutual fund

assets before any returns were paid to investors, thereby reducing the value of the investments. *Id.* at 171-172.

b. Petitioners sued Edison, the Benefits Committee, the Investment Committees, and others (respondents in this Court), alleging breach of fiduciary duties. Pet. App. 65-67. Petitioners sued on behalf of the Plan for losses suffered by the Plan, as well as for injunctive and other equitable relief. *Id.* at 65-66, 107. As relevant here, petitioners contended that respondents breached their duty of prudence by offering six higher-cost retail-class mutual funds as plan investments when identical lower-cost institutional-class funds were available. *Id.* at 65-68, 126. Respondents argued that petitioners' claims regarding three of the six mutual funds were time-barred because those funds were initially selected as plan investments more than six years before petitioners filed suit. *Id.* at 127.

c. The district court granted partial summary judgment to respondents. Pet. App. 166-268. The court held that 29 U.S.C. 1113(1) barred claims arising from respondents' retention of mutual funds that were first selected as plan investments more than six years before the complaint was filed, on the ground that "[t]here is no 'continuing violation' theory" under ERISA. Pet. App. 180 (quoting *Phillips* v. *Alaska Hotel & Rest. Emps. Pension Fund*, 944 F.2d 509, 520 (9th Cir. 1991), cert. denied, 504 U.S. 911 (1992)); *id.* at 262-263. The court stated that "although the [fiduciaries'] conduct could be viewed as a series of breaches, the statute of limitations did not begin anew because each breach was 'of the same character.'" *Id.* at 180 (quoting *Phillips*, 944 F.2d at 520).

After a bench trial, the district court held that respondents breached their duty of prudence by offering retail-class mutual funds as plan investments when identical lower-cost institutional-class funds were available. Pet. App. 68-69. The court concluded that respondents "ha[d] not offered any credible explanation" for why they chose to invest in the higher-cost funds. *Id.* at 142. The court found "no evidence" that the Investment Committees "even considered or evaluated the different share classes," and it determined that if the Investment Committees had considered the issue, "they would have realized that the institutional share classes offered the exact same investment at a lower cost to the Plan participants" and that plan participants were paying "wholly unnecessary fees." *Id.* at 129-130 (emphasis omitted).

The district court limited its finding of liability to the three mutual funds that were first offered to plan participants within the six-year limitations period, Pet. App. 68-69, 128-142, because it had already held that ERISA's six-year limitations period barred petitioners' claims regarding the three funds first offered before that period. The court allowed petitioners to argue that certain changed circumstances required removal of the latter three funds, but then rejected that argument. *Id.* at 142-150.

3. The court of appeals affirmed. Pet. App. 1-64. The court assessed the timeliness of petitioners' claims concerning the retention of the higher-cost mutual funds under 29 U.S.C. 1113(1)(A), the provision that requires suit to be brought within six years of the "last action" constituting the fiduciary breach. Pet. App. 17. The court reasoned that "the act of designating an investment for inclusion starts the six-

year period under [Section 1113(1)(A)] for claims asserting imprudence in the design of the plan menu," and so such a claim must be filed within six years of that initial designation. *Id.* at 17-18. In support of that holding, the court noted that it had previously rejected a "continuing violation" theory for ERISA claims. *Id.* at 17 (citing *Phillips*, 944 F.2d at 520).

With respect to the three mutual funds initially offered within the limitations period, the court of appeals upheld the district court's determination that respondents breached the duty of prudence by offering the higher-cost funds. Pet. App. 60-64. The court explained that "all three funds offered institutional options" in which the Plan "almost certainly could have participated"; the three institutional-class funds were significantly "cheaper than the retail class options"; and "there were no salient differences in the investment quality or management" of those funds. *Id.* at 61.[1]

SUMMARY OF ARGUMENT

Petitioners' claims that respondents breached their fiduciary duties by failing to prudently manage plan investments within the limitations period are timely under 29 U.S.C. 1113.

A. ERISA imposes on plan fiduciaries certain duties drawn from the law of trusts. Under ERISA's duty of prudence, plan fiduciaries must discharge

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[1] The court of appeals also held that respondents may not rely on ERISA's safe-harbor provision for certain individual-account plans, 29 U.S.C. 1104(c). Pet. App. 21-32. That holding is not before this Court, because respondents did not cross-petition on the issue or raise it as an alternate ground for affirmance in their brief in opposition. See Br. in Opp. 15 n.5 (characterizing the issue as "a completely separate issue not before this Court").

their duties using the "care, skill, prudence, and diligence" that a prudent person would use in making decisions for the plan. 29 U.S.C. 1104(a)(1)(B).

The duty of prudence under ERISA, as under trust law, requires plan fiduciaries with investment responsibility to examine periodically the prudence of existing investments and to remove imprudent investments within a reasonable period of time. A prudent trustee investigates a potential investment and then makes a reasonable decision based on that investigation. A prudent trustee also is cost-conscious in making investments. And once a trustee chooses investments, the trustee has an ongoing duty to systematically review them and to remove imprudent investments from the trust. Just as an individual investor would choose initial investments for her retirement plan and then revisit them periodically, so too an ERISA fiduciary who chooses investments for an ERISA plan must revisit those investments from time to time.

B. ERISA's limitations period applicable to suits for fiduciary breach provides that a suit must be brought within six years of "the last action which constituted a part of the breach or violation" or, in the case of an omission, "the latest date on which the fiduciary could have cured the breach or violation." 29 U.S.C. 1113(1)(A)-(B). Petitioners' contention that respondents breached the duty of prudence by offering higher-cost retail-class funds as investments when the same funds were available as lower-cost institutional-class funds is timely under that provision.

Respondents had an ongoing duty of prudence, which included a duty to revisit the plan investments and remove imprudent ones. Offering higher-cost retail-class funds when the same investments were

available as lower-cost institutional class funds was a breach of the duty of prudence. Accordingly, regardless of what happened before the limitations period, petitioners have adequately alleged that respondents breached the duty of prudence within the limitations period by failing to monitor fund fees and to switch to the lower-cost funds.

C. None of the court of appeals' reasons for finding petitioners' claims untimely has merit. First, petitioners' claims are based not on the initial decision to offer the higher-cost funds as plan investments, but on the breaches of fiduciary duty committed when the imprudent investments remained in the plan. These claims do not rely on a "continuing violation theory," Pet. App. 17, because they concern only acts and omissions *within* the limitations period—petitioners are not seeking to reach back and recover for fiduciary breaches before that time. Second, petitioners' claims do not impose liability on current fiduciaries for past fiduciaries' mistakes. Current fiduciaries have their own duty of prudence, and under petitioners' theory, they are being held liable for their own breaches, not those of others. Third, a plaintiff is not required to demonstrate significant changes in circumstances (*id.* at 19) to challenge the imprudent retention of plan investments. Under the law of trusts, a trustee must periodically review trust assets and remove imprudent investments, regardless of whether there has been a significant change in circumstances.

D. The court of appeals' rule would seriously jeopardize the investments of plan participants and beneficiaries. The court of appeals effectively exempted plan fiduciaries from a significant aspect of the trust-

law duties imposed by ERISA once an investment has been in an ERISA plan for six years. Such an exemption would have a real and substantial impact on the millions of Americans who participate in retirement savings plans. The court of appeals' decision therefore should be reversed and the case remanded for further proceedings.

ARGUMENT

A CLAIM THAT ERISA FIDUCIARIES BREACHED THEIR FIDUCIARY DUTIES BY OFFERING IMPRUDENT PLAN INVESTMENTS WITHIN THE SIX-YEAR LIMITATIONS PERIOD IS TIMELY EVEN THOUGH THE FIDUCIARIES INITIALLY SELECTED THOSE INVESTMENTS BEFORE THAT TIME

A. ERISA Fiduciaries Have An Ongoing Duty To Review Plan Investments And Divest Investments That Are Imprudent

1. The Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1001 *et seq.*, is designed to protect the interests of participants in employee benefit plans and their beneficiaries. 29 U.S.C. 1001(b). One way that it does so is by imposing certain trust-law duties on plan fiduciaries.[2] Fiduciaries must discharge their duties for the "exclusive purpose" of "providing benefits to participants and their beneficiaries" and "defraying reasonable expenses of administering the plan." 29 U.S.C. 1104(a)(1)(A). ERISA's "strict standards of trustee conduct" include "a stand-

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[2] ERISA requires that every plan have one or more named fiduciaries who have authority to control and manage the operation and administration of the plan. 29 U.S.C. 1102(a)(1). In addition, anyone who exercises authority or control respecting management or disposition of plan assets is a fiduciary. 29 U.S.C. 1002(21)(A)(i).

ard of care." *Central States, Southeast & Southwest Areas Pension Fund* v. *Central Transp. Inc.*, 472 U.S. 559, 570 (1985) (*Central States*). ERISA requires plan fiduciaries to discharge their responsibilities "with the care, skill, prudence, and diligence" that a prudent person "acting in a like capacity and familiar with such matters" would use. 29 U.S.C. 1104(a)(1)(B). The "prudent person" standard is based not on a prudent layperson, but on a prudent fiduciary who is "acting in a like capacity" and is "familiar with such matters" and is making decisions for "an enterprise of a like character and with like aims." *Ibid.*; see Pet. App. 113; accord *Fifth Third Bancorp* v. *Dudenhoeffer*, 134 S. Ct. 2459, 2468 (2014).

ERISA authorizes plan participants, beneficiaries, and fiduciaries, as well as the Secretary of Labor, to sue for appropriate relief to remedy a breach of fiduciary duty. 29 U.S.C. 1132(a)(2). In determining whether an ERISA fiduciary's investment was prudent, the court in such a suit reviews the investigation and decisionmaking process leading up to the challenged conduct. *Howard* v. *Shay*, 100 F.3d 1484, 1488 (9th Cir. 1996), cert. denied, 520 U.S. 1237 (1997). Fiduciaries who breach their duties are "personally liable" to the plan for losses resulting from the breach and for profits they made as a result of the breach. 29 U.S.C. 1109(a). Recovery for a breach of fiduciary duty "inures to the benefit of the plan." *Massachusetts Mut. Life Ins. Co.* v. *Russell*, 473 U.S. 134, 140 (1985). By placing fiduciary obligations on plan administrators and authorizing civil suits to remedy breaches of fiduciary duty, ERISA ensures that fiduciaries serve the interests of plan participants and

beneficiaries, provide the benefits due under the plan, and pay only reasonable expenses. See *id.* at 142.

2. ERISA's fiduciary duties "draw much of their content" from the common law of trusts. *Varity Corp.* v. *Howe*, 516 U.S. 489, 496-497 (1996). In particular, ERISA's standard of care was "derived from the common law of trusts." *Central States*, 472 U.S. at 570. This Court therefore "look[s] to principles of trust law for guidance" to interpret ERISA's fiduciary-duty provisions, including the duty of care at issue here. *Conkright* v. *Frommert*, 559 U.S. 506, 512 (2010) (citation and internal quotation marks omitted).

Trust law uses a "prudent person" standard to define the level of care, skill, and judgment required of a trustee. See, *e.g.*, 3 Restatement (Third) of the Law of Trusts § 77, at 81-82 (2007) (Third Restatement); 1 Restatement (Second) of the Law of Trusts § 174, at 379 (1959) (Second Restatement). Under that standard, "the trustee is required to manifest the care, skill, prudence, and diligence of an ordinarily prudent man engaged in similar business affairs and with objectives similar to those of the trust in question." George Gleason Bogert & George Taylor Bogert, *The Law of Trusts and Trustees* § 541, at 167 (rev. 2d ed. 1993); see 3 Austin Wakeman Scott et al., *Scott and Ascher on Trusts* § 17.6, at 1205 (5th ed. 2007) (Scott).

When a trustee is making investment decisions, the trustee's conduct is judged using a "prudent investor" standard. Third Restatement § 90, at 292. The trustee must "invest and manage the funds of the trust as a prudent investor would, in light of the purposes, terms, distribution requirements, and other circumstances of the trust." *Ibid.*; see Second Restatement § 227, at 529; see also 4 Scott § 19.1, at 1386, 1390-

1392 (noting that virtually every State has codified the "prudent investor" standard). The trustee must "make[] an investigation as to the safety of [an] investment and the probable income to be derived therefrom" and then make a reasonable investment decision based on that investigation. Second Restatement § 227 cmt. b, at 530. The trustee may seek the advice of "attorneys, bankers, brokers and others," but the trustee ultimately is responsible for the investment decision. *Ibid.*; see 4 Scott § 19.1.3, at 1397 (noting a trustee's "duty to exercise the trustee's own judgment" even if the trustee receives advice from others).

In making investment decisions, a prudent trustee seeks to minimize costs. "Trustees, like other prudent investors, prefer (and, as fiduciaries, ordinarily have a duty to seek) the lowest level of risk and cost for a particular level of expected return." Third Restatement § 90 cmt. f(1), at 308; see *id.* § 88 cmt. a, at 256 (trustee has "a duty to be cost-conscious"). Put simply, "[w]asting beneficiaries' money is imprudent." Uniform Prudent Investor Act § 7 & cmt., 7B U.L.A. 37 (2006). If a trustee pays improper expenses "from the trust estate," the trustee "ordinarily has a duty to restore the amount of the improper payment(s) to the trust." Third Restatement § 88 cmt. a, at 256-257.

A prudent trustee incurs "only costs that are reasonable in amount and appropriate to the investment responsibilities of the trusteeship." Third Restatement § 90(c)(3), at 293; 4 Scott § 19.1.2, at 1394 ("[T]he trustee must be cost-conscious * * * in carrying out the trustee's investment duties."). And in the particular context of mutual funds, trustees should pay "special attention" to "sales charges, com-

pensation, and other costs" and should "make careful overall cost comparisons, particularly among similar products of a specific type being considered for a trust portfolio." Third Restatement § 90 cmt. m, at 332.

3. A trustee has a duty to periodically review investments and to remove imprudent investments from the trust. "[A] trustee's duties apply not only in making investments but also in monitoring and reviewing investments." Third Restatement § 90 cmt. b, at 294-296. A trustee "owes the beneficiary the duty of examining and checking the trust investments periodically throughout the life of the trusteeship." Amy Morris Hess, George Gleason Bogert & George Taylor Bogert, *The Law of Trusts and Trustees* § 684, at 145 (3d ed. 2009) (Bogert 3d). The trustee's ongoing review of trust investments must be "reasonable and appropriate to the particular investments, courses of action, and strategies involved." Third Restatement § 90 cmt. b, at 294-296. The trustee "cannot assume that if investments are legal and proper for retention at the beginning of the trust, or when purchased, they will remain so indefinitely." Bogert 3d § 684, at 145-146; see Second Restatement § 231 cmt. a, at 550.

A trustee's ongoing duty to review trust investments is not limited to situations in which the trustee might be prompted to act because of a significant change in circumstances. A trustee, to be sure, must "review trust investments" as "changes occur," but the trustee also must "systematic[ally] consider[] * * * all the investments of the trust at regular intervals" to ensure that they are appropriate. Bogert 3d § 684, at 147-148 (suggesting an interval such as

"once every six months").[3] The trustee has a "continuing duty to see to it that the trust remains appropriately invested," and that includes a "duty, from time to time, to examine the state of the trust's investments." 4 Scott § 19.4, at 1451; see Bogert 3d § 685, at 159 (noting that "a trustee has a duty to continue to monitor investments regularly to ensure that they are still legal and productive"). The Uniform Prudent Investor Act (upon which many States' "prudent investor" laws are based) confirms that "[m]anaging embraces monitoring" and that a trustee has "continuing responsibility for oversight of the suitability of the investments already made." Uniform Prudent Investor Act § 2 cmt., 7B U.L.A. 21 (internal quotation marks omitted); see 4 Scott § 19.1.2, at 1390-1392. Accordingly, a trustee may be held liable for his "failure to use such proper care, watchfulness, and oversight" to monitor the trust's investment and prevent losses. *In re Stark's Estate*, 15 N.Y.S. 729, 731-732 (N.Y. Surr. Ct. 1891) (holding that a trustee who invested in bonds secured by a mortgage failed to "exercise[] a reasonable degree of diligence in looking after the security after the investment had been made").

A trustee also has a duty at all times to divest investments that are imprudent or otherwise inappropriate for the trust. If an investment is "determined to be imprudent," the trustee "must dispose of it within a reasonable time." Bogert 3d § 685, at 156-157; see

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[3] For example, federal law requires national banks to conduct at least yearly reviews of "all assets of each fiduciary account for which the bank has investment discretion to evaluate whether they are appropriate, individually and collectively, for the account." 12 C.F.R. 9.6(c).

4 Scott § 19.3.1, at 1439-1440. The duty to dispose of imprudent investments corresponds with the trustee's ongoing duty to monitor investments and runs throughout the trusteeship, from the time the trustee first takes office until the trustee leaves office. See Second Restatement § 230, at 544; *id.* § 231, at 550. A trustee who fails to remove imprudent investments is liable to the trust for losses suffered by the trust. See, *e.g.*, *State St. Trust Co.* v. *DeKalb*, 157 N.E. 334, 336 (Mass. 1927) (trustee was required to take action to "protect the rights of the beneficiaries" when the value of trust assets declined); *Johns* v. *Herbert*, 2 App. D.C. 485, 499 (1894) (holding trustee liable for failure to discharge his "duty to watch the investment with reasonable care and diligence"); see also 4 Scott 19.4, at 1451-1452 & n.10 (citing cases).

4. These trust-law principles apply to ERISA fiduciaries with investment responsibility. See, *e.g.*, *CIGNA Corp.* v. *Amara*, 131 S. Ct. 1866, 1879 (2011) (ERISA "typically treats" a plan fiduciary as a trustee and the plan as a trust.). Like a trustee, an ERISA fiduciary is required to manage plan assets prudently at all times. See 29 U.S.C. 1104(a)(1)(B); *Fifth Third Bancorp*, 134 S. Ct. at 2463, 2467 (ERISA "requires the fiduciary of a pension plan to act prudently in managing the plan's assets"). As part of that ongoing duty, ERISA fiduciaries have a "continuing fiduciary duty" to "review plan investments and eliminate imprudent ones" within a reasonable period of time. *Martin* v. *Consultants & Adm'rs, Inc.*, 966 F.2d 1078, 1087-1088 (7th Cir. 1992); see Br. in Opp. 8 ("Nobody disagrees" that "ERISA fiduciaries have a continuing duty to monitor the investments offered."). This duty is a common-sense one: just as an individual investor

would make an initial choice of investments for her retirement plan and then revisit that choice periodically, so too a fiduciary choosing investments for an ERISA plan makes an initial decision about what funds to offer and then must revisit those investments from time to time.

This duty of periodic review of plan investments includes not only consideration of performance, but also of costs, because a prudent investor is "cost-conscious." Third Restatement § 88 cmt. a, at 256; see, *e.g.*, *Martin* v. *Feilen*, 965 F.2d 660, 671 (8th Cir. 1992) (overpaying for an ERISA plan asset is imprudent and not in the interests of the participants and beneficiaries), cert. denied, 506 U.S. 1054 (1993). Indeed, ERISA expressly requires that, in discharging their duties, fiduciaries limit expenses to those that are "reasonable." 29 U.S.C. 1104(a)(1)(A).

The duty to remove imprudent investments is ongoing, and it applies even if the fiduciary is not responsible for the initial investment decision or the initial decision is beyond challenge. See *Morrissey* v. *Curran*, 567 F.2d 546, 548-549 & n.9 (2d Cir. 1977) (explaining that plan fiduciaries in that case "cannot be excused" from their obligation to review plan assets "merely because the unwise investment was made before ERISA took effect"); cf. 29 U.S.C. 1105(a)(3) (ERISA fiduciary has an obligation to make "reasonable efforts" to remedy a breach of fiduciary duty by another plan fiduciary). Accordingly, an ERISA fiduciary cannot evade the ongoing duty of prudence by relying on investment decisions made by a different fiduciary or at an earlier time.

B. Petitioners' Claims For Breach Of Fiduciary Duty Are Timely Under 29 U.S.C. 1113

1. ERISA includes a limitations provision applicable to suits for breach of fiduciary duty. It provides that "[n]o action" for breach of fiduciary duty "may be commenced" after the earlier of "six years after (A) the date of the last action which constituted a part of the breach or violation, or (B) in the case of an omission the latest date on which the fiduciary could have cured the breach or violation." 29 U.S.C. 1113(1). A three-year limitations period applies if the plaintiff had "actual knowledge of the breach or violation," and a six-year discovery rule applies in "case[s] of fraud or concealment." 29 U.S.C. 1113. Neither of those special rules is at issue here.[4]

By its plain terms, the limitations period allows a plan participant or beneficiary (or the Secretary) to bring suit for any breach of fiduciary duty that occurred by act or omission within six years of the suit. Further, the statute specifies that only the "last action" constituting "part of" the breach or violation, or the "latest date" on which the breach or violation by omission could have been cured, needs to have occurred within the six-year limitations period. 29 U.S.C. 1113(1). Accordingly, petitioners' claims are

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[4] Petitioners contended below that the discovery rule for cases of fraud or concealment applied, but the district court rejected that argument, Pet. App. 179-181, and petitioners did not renew it on appeal. Respondents argued that the shortened limitations period for cases of actual knowledge applied, but the district court and court of appeals rejected that argument. *Id.* at 19-21, 181. Respondents did not cross-petition for certiorari on that issue and only mentioned it in passing in their brief in opposition. See Br. in Opp. 11 n.3.

timely as long as petitioners allege that some part of respondents' breach of the duty of prudence occurred within six years of the filing of the complaint, or that respondents breached the duty of prudence by omission and could have cured the breach within the six-year period.

2. Petitioners contend that respondents breached the duty of care in making certain investments available for the Edison Plan. The Plan offers participants a selection of investments, including about 40 mutual funds. Pet. App. 13-14. This case focuses on six of those mutual funds. Petitioners' claim is that "it was objectively imprudent for the Plan fiduciaries to decide to invest (or to continue to invest) in retail share classes of the six mutual funds where identical investments were available in the institutional share classes for lower fees." *Id.* at 126.

Some mutual funds offer both retail and institutional share classes, and the institutional share classes "often charge lower fees (i.e., a lower expense ratio) because the amount of assets invested" by institutional investors "is far greater than the typical individual investor." Pet. App. 84.[5] For each of the six mutual funds challenged in this case, "[t]he only difference between the retail share classes and the institutional share classes was that the retail share classes charged higher fees to the Plan participants." *Id.* at 128-129; see *id.* at 61. The difference in fees was significant—for the six funds at issue, the retail-class funds ranged from 18 to 40 basis points higher than the institution-

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[5] Mutual fund fees are commonly expressed in an expense ratio, which is the percentage of the assets under management that is paid as fees. Pet. App. 79-80.

al-class funds. *Id.* at 85, 87, 90, 92, 94, 97.[6] As the courts below recognized (*id.* at 60-64, 68-69), it was imprudent to offer retail-class mutual funds to plan participants when the same funds were available as lower-cost, institutional-class funds.

The district court found, however, that respondents engaged in no "discussion or evaluation of the institutional versus retail share classes" and that there is "no evidence" that respondents "even considered or evaluated the different share classes" for these funds. Pet. App. 129 (emphasis omitted); see *id.* at 90, 94, 98. Had respondents sought to invest in the institutional-class funds, as opposed to the retail-class funds, they could have done so. *Id.* at 61, 86-87, 91-92, 94, 96. Although the institutional-class funds all had investment minimums, "a prudent fiduciary managing a 401(k) plan the size of the Edison Plan could have (and would have) obtained a waiver of the investment minimums." *Id.* at 137-140.[7] The result of respondents' decision to offer the higher-cost retail-class funds was that participants in the Plan paid "wholly unnecessary

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[6] A basis point is one-hundredth of one percent. *Black's Law Dictionary* 172 (9th ed. 2009).

[7] For one of the three mutual funds added to the Plan within the limitations period, the Investment Committees did "review the merits of the institutional share class of the [fund] versus the retail share class" as part of an inquiry about whether to transfer assets from another fund into that fund, and they ultimately decided to switch from the higher-cost retail-class fund to the lower-cost institutional-class fund. Pet. App. 131. That decision was "very telling," because the one time the plan fiduciaries "actually reviewed the different share classes of one of these three funds," they "realized that it would be prudent to invest in the institutional share class rather than the retail share class." *Id.* at 131-132.

fees" that eroded the value of their retirement accounts. *Id.* at 130.

The courts below correctly concluded that respondents breached their duty of prudence by offering the higher-cost retail-class funds as plan investments when the lower-cost institutional-class funds were available. "[A] prudent person managing his own funds would invest in the cheaper share class, all else being equal, because doing so saves money." Pet. App. 126-127; see, *e.g.*, Third Restatement §§ 88 & cmt. a, 90(c)(3) & cmt. f(1), at 256-257, 293, 308 (trustee has a duty to minimize costs). But the courts below limited their holdings to the three funds that were first added as plan investments within the six-year limitations period. That was error, because respondents had an ongoing duty of prudence with respect to plan investments, and petitioners have alleged breaches of that duty within the six-year limitations period.

3. The timeliness of a fiduciary-breach claim depends on the nature of the claim. See, *e.g.*, *Fish* v. *GreatBanc Trust Co.*, 749 F.3d 671, 680 (7th Cir. 2014) (court must "examine the nature of the alleged breaches" to determine whether fiduciary-breach claims are timely). For the three mutual funds at issue for limitations purposes, petitioners challenge the imprudent retention of the funds during the limitations period from 2001 through 2007 and not the initial selection of the funds in 1999. Petitioners seek to recover "losses caused to the Plan * * * within the six years preceding commencement of their action" by respondents' "failure" to "switch[] from retail to institutional class shares." Pet. C.A. Br. 16 (cita-

tion and internal quotation marks omitted); see Pet. Br. 39-42.

Petitioners' claims are timely because they are claims for breaches of the duty of prudence within the limitations period. ERISA's duty of prudence requires fiduciaries with investment responsibility to periodically examine the prudence of existing investments and remove imprudent investments from the Plan. Here, the Investment Committees had "a continuing duty to see to it that the [plan assets] remain[ed] appropriately invested," and that duty required them "to examine the state of the trust's investments" "from time to time" to determine whether the investments were appropriate. 4 Scott § 19.4, at 1451; see, *e.g.*, *id.* § 19.1.2, at 1395; Bogert 3d § 684, at 147-148. The Investment Committees met quarterly, and at those meetings, they received reports and recommendations from investments staff and decided whether to make changes to the investment portfolio. Pet. App. 74-75, 253-254; J.A. 120-121, 170. On several occasions, the Investment Committees removed funds from the Plan. Pet. App. 76-78.

Although the Investment Committees took those steps to monitor plan investments, they failed to consider a key question, which was whether the mutual funds at issue were available as lower-cost institutional-class funds. Although "the fund's total expense ratio" was one of the Plan's investment criteria, J.A. 145, 151, 176, 230, and those criteria "were expected to be applied periodically in [the] monitoring of the[] plan investments," J.A. 183; see J.A. 124, 155-156, 169, respondents never "even considered or evaluated the different share classes" of the mutual funds at issue, Pet. App. 129; see *id.* at 63-64. The Investment Com-

mittees "were not informed about the institutional share classes and did not conduct a thorough investigation" of fund fees. *Id.* at 130. These facts establish breaches of the ongoing duty of prudence within the limitations period, because a prudent fiduciary would have considered whether institutional-class funds were available and would have offered those funds to save money for plan participants. *Id.* at 142.

4. Petitioners have argued that respondents violated their fiduciary duties within the limitations period through both actions constituting breaches and omissions that they failed to cure, and petitioners have invoked both parts of Section 1113(1).[8] They contend that respondents committed "breaches by action" when they "conduct[ed] imprudent reviews during each quarterly meeting," and that respondents breached their fiduciary duties by "omission" by "failing to monitor properly the investment options on a periodic basis and to remove the imprudent retail classes." Pet. Br. 41.

At a minimum, petitioners have stated timely claims of a breach of fiduciary duty by omission. Petitioners' claims that respondents failed to review fund fees, inquire about the availability of lower-cost

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[8] See Pet. C.A. Br. 16 ("[T]he 'last action which constituted a part of the breach'—using retail class shares—occurred within six years and the 'latest date on which the fiduciary could have cured the breach'—replacing retail with institutional shares—also occurred within six years." (quoting 29 U.S.C. 1113(1)(A)-(B)); Pet. C.A. Reply Br. 29-30 (specifically arguing that respondents' "breach also is one of omission"); J.A. 76 (alleging that respondents breached their fiduciary duties by "subjecting the Plan and its participants to the high costs of retail/publicly-traded mutual funds and failing to provide investment options with significantly lower costs").

institutional-class funds, and switch to those funds are based on "omission[s]" that occurred at the quarterly meetings within the limitations period, and those breaches by omission were ones the "fiduciary could have cured" during that period. 29 U.S.C. 1113(1)(B). The courts below did not specifically address whether petitioners' claims are better characterized as claims of breaches of fiduciary duty by action or by omission because they categorically rejected any such claims.[9] But it is clear that petitioners' challenge concerns events that occurred within the limitations period, so whether viewed as breaches of the ongoing duty of prudence by actions or by omissions, their claims are timely under 29 U.S.C. 1113.

C. The Court Of Appeals' Reasons For Finding Petitioners' Claims Untimely Lack Merit

1. The court of appeals found petitioners' claims untimely by characterizing them as "alleging imprudence in plan design" and then reasoning that such claims accrued when "the decision to include th[e] investments in the Plan was initially made." Pet. App. 17. The court misunderstood the nature of petitioners' claims. For the three mutual funds added before

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[9] Although petitioners argued below that their fiduciary-breach claims are timely under both parts of Section 1113(1), the court of appeals analyzed the claims only under paragraph (A), which addresses affirmative actions within the limitations period. See Pet. App. 17-18. The court did not give any reason for that limited consideration. It was wrong for the court to ignore paragraph (B), which addresses omissions, because petitioners relied on both parts of Section 1113(1) in their briefing (see, *e.g.*, Pet. C.A. Br. 16; Pet. C.A. Reply Br. 29-30) and because they have identified specific ways in which respondents failed to act as prudent fiduciaries within the limitations period (see, *e.g.*, Pet. Br. 39-42).

the limitations period, petitioners challenge not the initial selection of the funds but the imprudent management of the Plan during the limitations period. Petitioners do not seek to recover damages for the fees charged going back to 1999, when the three funds were first added to the Plan; instead, they seek to recover for losses resulting from the excessive fees charged to plan participants from 2001 to 2007 (the six years before they filed suit). Their claims do not depend on the propriety of the initial investment decision; they depend on an ERISA fiduciary's "continuing fiduciary duty" to review plan investments periodically and remove those that are imprudent. *Martin*, 966 F.2d at 1087-1088. Petitioners have alleged breaches of that continuing duty during the limitations period, and so their claims are timely. The court of appeals' contrary conclusion absolves ERISA fiduciaries of their continuing duty of prudence and immunizes bad investment decisions after six years have elapsed.

Relatedly, the court of appeals reasoned that petitioners' claims are untimely because there is no "continuing violation theory" under ERISA. Pet. App. 17. That rationale again assumes that petitioners alleged a single breach of fiduciary duty that occurred when the funds were added to the Plan in 1999 and that continued to harm plan participants through the limitations period. But petitioners do not argue that there was a "continuing violation," in the sense of one violation starting on the date of the initial selection of investments that permits a plaintiff to obtain damages reaching back to that date. Instead, they contend that respondents breached a continuing duty of prudence *within* the limitations period by failing to research

fund options and offer available lower-cost institutional-class funds. J.A. 71, 76-78.[10]

2. The court of appeals confused "[s]eparately accruing harm" with "harm from past violations that are continuing." *Petrella* v. *Metro-Goldwyn-Mayer, Inc.*, 134 S. Ct. 1962, 1969 n.6 (2014). Petitioners do not seek to recover for the initial decision to include the mutual funds as plan investments. Instead, they seek to recover for the "new wrong[s]" committed within the limitations period, when respondents breached their ongoing duty to manage the plan investments in a prudent manner. *Id.* at 1969. Those new wrongs gave petitioners a new opportunity to bring suit to recover for losses suffered during the limitations period, even though petitioners could not recover for losses caused by the same type of imprudent actions or omissions before the limitations period.

The Court has recognized that a plaintiff may sue for violations occurring within the limitations period even if the plaintiff is barred from recovering for

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[10] The decision upon which the court of appeals relied—*Phillips* v. *Alaska Hotel & Restaurant Employees Pension Fund*, 944 F.2d 509 (9th Cir. 1991), cert. denied, 504 U.S. 911 (1992)—provides no valid basis for finding petitioners' claims untimely. *Phillips* concerned the shortened limitations period applicable to a fiduciary-breach claim when the plaintiff had actual knowledge of the breach. *Id.* at 520. In that context, the court concluded that because the limitations period began on "the earliest date" the plaintiff had "actual knowledge" of the breach (29 U.S.C. 1113(2)), the plaintiff must sue within three years of that first breach. *Ibid.* That holding is inapposite here because the limitations period uses materially different language—not the "earliest date" the plaintiff had knowledge but the "last action" constituting a breach or the "latest date" when the breach by omission could have been cured. See 944 F.2d at 520; compare 29 U.S.C. 1113(2) with 29 U.S.C. 1113(1).

similar violations outside the limitations period. For example, in the copyright context, the Court has explained that each act of copyright infringement gives rise to a separate claim, and a plaintiff may sue for acts of infringement within the three-year limitations period even when she cannot sue for similar acts of copyright infringement committed before that time. See *Petrella*, 134 S. Ct. at 1969. In those circumstances, the copyright holder may recover only for acts of infringement within the limitations period and may not reach back to recover for acts of infringement before that time. *Id.* at 1969-1970.

Similarly, in a case about an employer's liability for withdrawal from a multi-employer pension plan, the Court recognized that an employer may be liable for missed withdrawal liability payments within the limitations period, even if the employer also had missed payments before the limitations period. See *Bay Area Laundry & Dry Cleaning Pension Trust Fund* v. *Ferbar Corp. of Cal., Inc.*, 522 U.S. 192, 206-208 (1997) (*Bay Area Laundry*). The Court recognized that "each missed payment creates a separate cause of action with its own six-year limitations period." *Id.* at 206. And the Court rejected the argument that "a plan that sues too late to recover the first payment forfeits the right to recover any of the outstanding withdrawal liability." *Ibid.* Instead, the Court recognized that the way to account for the limitations period is to limit the plaintiffs' recovery to violations that occurred within that period. *Id.* at 195-196.

Just as the copyright owner in *Petrella* and the pension fund in *Bay Area Laundry* could bring claims for violations within the limitations periods even though similar violations occurred before those peri-

ods, so too may petitioners bring claims for breach of fiduciary duty during the limitations period even though they may not challenge the initial decision to invest in those funds. Section 1113 cannot bar a claim of a "failure to invest prudently during the period within [six] years of the commencement of th[e] suit" when it is based on discrete breaches within the limitations period, even if they are part of a series of acts or omissions that commenced earlier; the effect of Section 1113 in that situation is to limit "damages recoverable" to the breaches within the limitations period. *Fink* v. *National Sav. & Trust Co.*, 772 F.2d 951, 962-963 (D.C. Cir. 1985) (Scalia, J., concurring in part and dissenting in part).

Accordingly, petitioners' failure to challenge the initial decision to offer the three mutual funds added as plan investments in 1999 does not bar them from recovering for imprudent investment management within the limitations period. That result would be contrary not only to the general principles of limitation law discussed above but also to Congress's specific decision under ERISA to permit plan participants and beneficiaries to sue based on the "*last* action" constituting a part of the breach and the "*latest* date" on which a breach by omission could be cured. 29 U.S.C. 1113(1) (emphases added).

3. The court of appeals' decision was based in part on its concern that finding petitioners' claims timely would "expose present Plan fiduciaries to liability for decisions made by their predecessors." Pet. App. 18 (citation omitted). That concern is misplaced. ERISA expressly provides that "[n]o fiduciary shall be liable with respect to a breach of fiduciary duty * * * if such breach was committed before he became a fiduci-

ary or after he ceased to be a fiduciary." 29 U.S.C. 1109(b). But the new fiduciary may be liable for his own breaches of the ongoing fiduciary duty of prudence.

An ERISA fiduciary with responsibility for plan investments has a duty to periodically review those investments and remove imprudent ones, even if that fiduciary did not make the initial investment decision. Under the law of trusts, it is well-established that one of a trustee's first duties upon taking office is to review the settlor's investments and "dispose of any part of the trust property included in the trust at the time of its creation which would not be a proper investment for the trustee to make." Second Restatement § 230, at 544. Similarly, an ERISA fiduciary may not simply assume that past investment decisions were (or continue to be) proper; the fiduciary has an independent obligation to periodically review the plan investments. ERISA makes this point clear, because it requires fiduciaries to "make[] reasonable efforts" to remedy a breach of fiduciary duty by another fiduciary. 29 U.S.C. 1105(a)(3).

If ERISA fiduciaries fail to periodically monitor the investments and remove imprudent ones, the fiduciaries are being held liable for their own mismanagement of plan investments, not for "decisions made by their predecessors" (Pet. App. 18). And the court of appeals' decision would have the perverse effect of enshrining a predecessor's imprudent investment decisions and exempting the new fiduciary's ongoing management of the plan from scrutiny.

4. The court of appeals concluded that petitioners could only bring a timely claim for fiduciary breach if they demonstrated "significant changes in conditions

* * * that should have prompted a full due diligence review of the funds." Pet. App. 19 (citation and internal quotation marks omitted). But an ERISA fiduciary's ongoing duty of prudence is not limited to reacting to changed circumstances. As explained above (see pp. 13-15, *supra*), under the law of trusts, "[t]he duty to review trust investments should be performed" not only "as changes occur," but "also by a systematic consideration of all the investments of the trust at regular intervals." Bogert 3d § 684, at 147-148; see 4 Scott § 19.4, at 1451 (trustee has a "duty, from time to time, to examine the state of the trust's investments"); Uniform Prudent Investor Act § 2 cmt., 7B U.L.A. 21 (a trustee has "continuing responsibility for oversight of the suitability of investments already made"). A trustee who fails to monitor investments and make appropriate changes breaches the duty of prudence. See, *e.g.*, *Johns*, 2 App. D.C. at 499 (trustee breached his "duty to watch the investment with reasonable care and diligence"); *Stark's Estate*, 15 N.Y.S. at 731-732 (trustee failed to "exercise[] a reasonable degree of diligence in looking after the security after the investment had been made").

Respondents contend that the trust-law duty to remove imprudent investments arises only when changed circumstances make the investment imprudent. Resp. Supp. Cert. Br. 4 (citing Second Restatement § 231, at 550). But the Restatement language upon which respondents rely assumes that the trustee's initial investment decision was prudent and then addresses whether changed circumstances have made the investment imprudent. The Restatement first explains that a trustee has a duty upon taking office to review the trust investments and "dispose of any part

of the trust property" that is not a proper investment. Second Restatement § 230, at 544. The Restatement then provides that, if the initial investment was prudent, but the investment at some point has become imprudent, the trustee must divest it within a reasonable period of time. *Id.* § 231, at 550. In particular, the Restatement provides that if the "trustee holds property which when acquired by him was a proper investment, but which thereafter becomes an investment which would not be a proper investment for the trustee to make," the trustee has a "duty * * * to the beneficiary to dispose of the property within a reasonable time." *Ibid.*

The point of this provision is that a trustee has a duty at all times to remove imprudent investments from the trust. If the initial investments were proper, the trustee still has an ongoing duty of prudence to periodically review the investments and dispose of an inappropriate investment. Nothing in the Restatement—or the law of trusts generally—establishes that a trustee may continue to retain an investment that has been imprudent from the outset and remains imprudent, simply because circumstances have not significantly changed. And not only is respondents' view inconsistent with the law of trusts, but it would create uncertainty for fiduciaries about whether circumstances have changed enough to warrant a review of plan investments and would complicate fiduciary-breach suits by requiring mini-trials on that question.

"It is not by prudent investment alone that a trustee performs his whole duty in regard to a trust fund"; the trustee is "bound to be watchful," to "keep himself informed" about the fund, and to "tak[e] all prudent means to prevent a loss to the estate." *Stark's Estate*,

15 N.Y.S. at 731-732. The same is true under ERISA. ERISA fiduciaries have an ongoing duty of prudence, and that duty requires them to periodically assess whether investments and the expenses associated with them remain prudent—regardless of whether any external event should have prompted a review.

D. The Court Of Appeals' Rule Disserves The Purposes Of ERISA

1. A primary reason that Congress enacted ERISA was to stop the "misuse and mismanagement of plan assets by plan administrators" *Russell*, 473 U.S. at 141 n.8. ERISA imposes "standards of conduct, responsibility, and obligation"—and authorizes suits to enforce those duties—to stop and prevent such mismanagement. 29 U.S.C. 1001(b). These duties apply both to named fiduciaries and those who act as fiduciaries by exercising authority or control over plan assets, and there is no limit on the duration of fiduciary duties so long as the fiduciaries continue to hold the position. See 29 U.S.C. 1002(21)(A)(i), 1102(a)(1). But the effect of the court of appeals' rule is to exempt ERISA fiduciaries from those important duties and to immunize imprudent plan investments so long as those investments have been offered in the plan for more than six years and circumstances have not significantly changed.

Under the court of appeals' rule, so long as an investment had been in an ERISA plan for at least six years, plan participants and beneficiaries—and the Secretary—could not challenge the fiduciary conduct regarding the investment as imprudent unless a change in circumstances made the investment even more imprudent. That would be true even if the continued imprudence of the investment is obvious. See

Pet. App. 126-127 ("[A] prudent person managing his own funds would invest in the cheaper share classes, all else being equal, because doing so saves money."). And a participant who invested in the plan or the particular investment option at issue more than six years after the initial investment decision could never sue. See J.A. 58 (class includes participants who began investing in the Plan more than six years after the mutual funds at issue initially were added as plan investments).

Further, a person who became a fiduciary within the limitations period would be immunized from liability even if she never reviewed the investments. Under the court of appeals' rule, fiduciaries would have no incentive to monitor and update plan investments, and they could retain imprudent investment options forever (absent changed circumstances) once the investment options had been available for more than six years. The result would be to place plan participants' retirement savings in jeopardy. And the effect of the court of appeals' rule would be particularly significant in light of the long investment horizon for retirement savings accounts.

2. The court of appeals' rule could have a great adverse effect for participants in and beneficiaries of ERISA retirement plans. Saving for retirement is a significant undertaking for many Americans. As of 2011, more than 88 million Americans participated in defined-contribution plans like the plan at issue here. Employee Benefits Sec. Admin., U.S. Dep't of Labor, *Private Pension Plan Bulletin: Abstract of 2011 Form 5500 Annual Reports* 3 tbl. A1 (Sept. 2014), http://www.dol.gov/ebsa/pdf/2011pensionplanbulletin.pdf. As of 2014, those defined-contribution

plans held an estimated $5.2 trillion in assets. Bd. of Governors of the Fed. Reserve Sys., *Financial Accounts of the United States: Flow of Funds, Balance Sheets, and Integrated Macroeconomic Accounts* 131 tbl. L.117.c (Sept. 2014), http://www.federalreserve.gov/releases/z1/Current/z1.pdf; see Pet. App. 167 (in 2007, the Edison Plan held $3.8 billion in assets). Defined-contribution plans make up more than one quarter of all retirement assets in the United States. Investment Co. Inst., *Defined Contribution Plan Participants' Activities, First Half 2014* 2 fig. 1 (Nov. 2014), http://www.ici.org/pdf/ppr_14_rec_survey_q2.pdf. Mutual funds make up a majority of the assets in defined-contribution plans. See Investment Co. Inst., *2014 Investment Company Fact Book* 11 (54th ed.), http:// www.ici.org/pdf/2014_factbook.pdf.

A key concern of investors in retirement plans is the erosion of their long-term earnings by fees. Even small differences in fees can make a significant difference in the value of an individual account over time. See Employee Benefits Sec. Admin., U.S. Dep't of Labor, *A Look at 401(k) Plan Fees* 1-2 (Aug. 2013), http://www.dol.gov/ebsa/pdf/401kFees Employee.pdf.[11] In this case, respondents' breach of their duty of prudence shortchanged plan participants and beneficiaries by charging them "wholly unnecessary fees." Pet. App. 129-130. Left unremedied, that fiduciary breach

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[11] For example, a 30-year-old earning $60,000 per year, receiving 2% annual raises, and investing 15% of annual salary will (assuming a 7% rate of return and 1% in expenses) have $1.3 million by age 65. Walter Updegrave, *How High Fees Can Derail Retirement*, Wall St. J., June 21, 2014, at B8. But if the expenses were just half a percentage point higher, the value of the account at age 65 would fall by $100,000 to $1.2 million. *Ibid.*

will continue to harm the tens of thousands of participants in the multi-billion-dollar plan in this case. See *id.* at 167. And the court of appeals' broad ruling, if affirmed by this Court, would severely weaken the fiduciary duties Congress put in place to protect participants and beneficiaries in ERISA plans.

CONCLUSION

The judgment of the court of appeals should be reversed, and the case should be remanded for appropriate proceedings.

Respectfully submitted.

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APPENDIX

1. 29 U.S.C. 1104 provides in pertinent part:

Fiduciary duties

(a) Prudent man standard of care

(1) Subject to sections 1103(c) and (d), 1342, and 1344 of this title, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and—

(A) for the exclusive purpose of:

(i) providing benefits to participants and their beneficiaries; and

(ii) defraying reasonable expenses of administering the plan;

(B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;

(C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and

(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this subchapter and subchapter III of this chapter.

(2) In the case of an eligible individual account plan (as defined in section 1107(d)(3) of this title), the diversification requirement of paragraph (1)(C) and the prudence requirement (only to the extent that it requires diversification) of paragraph (1)(B) is not violated by acquisition or holding of qualifying employer real property or qualifying employer securities (as defined in section 1107(d)(4) and (5) of this title).

* * * * *

2. 29 U.S.C. 1105 provides in pertinent part:

Liability for breach of co-fiduciary

(a) Circumstances giving rise to liability

In addition to any liability which he may have under any other provisions of this part, a fiduciary with respect to a plan shall be liable for a breach of fiduciary responsibility of another fiduciary with respect to the same plan in the following circumstances:

(1) If he participate knowingly in, or knowingly undertakes to conceal, an act or omission of such other fiduciary, knowing such act or omission is a breach;

(2) If, by his failure to comply with section 1104(a)(1) of this title in the administration of his specific responsibilities which give rise to his status as a fiduciary, he has enabled such other fiduciary to commit a breach; or

(3) If he has knowledge of a breach by such other fiduciary, unless he makes reasonable efforts under the circumstances to remedy the breach.

* * * * *

3. 29 U.S.C. 1109 provides:

Liability for breach of fiduciary duty

(a) Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary. A fiduciary may also be removed for a violation of section 1111 of this title.

(b) No fiduciary shall be liable with respect to a breach of fiduciary duty under this subchapter if such breach was committed before he became a fiduciary or after he ceased to be a fiduciary.

4. 29 U.S.C. 1113 provides:

Limitation of actions

No action may be commenced under this subchapter with respect to a fiduciary's breach of any respon-

sibility, duty, or obligation under this part, or with respect to a violation of this part, after the earlier of—

(1) six years after (A) the date of the last action which constituted a part of the breach or violation, or (B) in the case of an omission the latest date on which the fiduciary could have cured the breach or violation, or

(2) three years after the earliest date on which the plaintiff had actual knowledge of the breach or violation;

except that in the case of fraud or concealment, such action may be commenced not later than six years after the date of discovery of such breach or violation.

5. 29 U.S.C. 1132 provides in pertinent part:

Civil enforcement

(a) **Persons empowered to bring a civil action**

A civil action may be brought—

(1) by a participant or beneficiary—

(A) for the relief provided for in subsection (c) of this section, or

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title;

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan;

(4) by the Secretary, or by a participant, or beneficiary for appropriate relief in the case of a violation of 1025(c) of this title;

(5) except as otherwise provided in subsection (b) of this section, by the Secretary (A) to enjoin any act or practice which violates any provision of this subchapter, or (B) to obtain other appropriate equitable relief (i) to redress such violation or (ii) to enforce any provision of this subchapter;

(6) by the Secretary to collect any civil penalty under paragraph (2), (4), (5), (6), (7), (8), or (9) of subsection (c) of this section or under subsection (i) or (*l*) of this section;

(7) by a State to enforce compliance with a qualified medical child support order (as defined in section 1169(a)(2)(A) of this title);

(8) by the Secretary, or by an employer or other person referred to in section 1021(f)(1) of this title, (A) to enjoin any act or practice which violates subsection (f) of section 1021 of this title, or (B) to obtain appropriate equitable relief (i) to redress such violation or (ii) to enforce such subsection;

(9) in the event that the purchase of an insurance contract or insurance annuity in connection

with termination of an individual's status as a participant covered under a pension plan with respect to all or any portion of the participant's pension benefit under such plan constitutes a violation of part 4 of this title[1] or the terms of the plan, by the Secretary, by any individual who was a participant or beneficiary at the time of the alleged violation, or by a fiduciary, to obtain appropriate relief, including the posting of security if necessary, to assure receipt by the participant or beneficiary of the amounts provided or to be provided by such insurance contract or annuity, plus reasonable prejudgment interest on such amounts; or

(10) in the case of a multiemployer plan that has been certified by the actuary to be in endangered or critical status under section 1085 of this title, if the plan sponsor—

(A) has not adopted a funding improvement or rehabilitation plan under that section by the deadline established in such section, or

(B) fails to update or comply with the terms of the funding improvement or rehabilitation plan in accordance with the requirements of such section,

by an employer that has an obligation to contribute with respect to the multiemployer plan or an employee organization that represents active participants in the multiemployer plan, for an order compelling the plan sponsor to adopt a funding improvement or rehabilitation plan or to update or

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[1] So in original. Probably should be "subtitle".

comply with the terms of the funding improvement or rehabilitation plan in accordance with the requirements of such section and the funding improvement or rehabilitation plan.

* * * * *

AMICUS CURIAE BRIEF

No. 13-550

IN THE SUPREME COURT OF THE UNITED STATES

GLENN TIBBLE, et al.,

Petitioners,

v.

EDISON INTERNATIONAL, et al.,

Respondents.

On Writ of Certiorari
To The United States Court of Appeals
For The Ninth Circuit

BRIEF AMICUS CURIAE OF AARP IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS CURIAE[1]

AARP is a nonpartisan, nonprofit organization with a membership that helps people turn their goals and dreams into real possibilities, strengthens communities and fights for the issues that matter most to families such as healthcare, employment and income security, retirement planning, affordable utilities and protection from financial abuse. In its efforts to foster the economic security of individuals as they age, AARP seeks to increase the availability, security, equity, and adequacy of public and private pension, health, disability and other employee benefits.

The protections afforded by the Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1001, are of vital concern to workers of all ages and to retirees, as the quality of workers' lives in retirement depends heavily on their eligibility for, and the amount of, their retirement and welfare benefits. It is important to ERISA plan participants to ensure that plan assets will be available to pay the benefits to which they are entitled and that these assets are used exclusively for the benefit of participants. ERISA § 404(a)(1)(A), 29 U.S.C.

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[1] In accordance with this Court's Rule 37.6, no party's counsel wrote this brief in whole or in part and no person other than *amicus* or its counsel made a monetary contribution intended to fund the preparation or submission of the brief. The parties have consented to the filing of amicus briefs and have filed letters reflecting their blanket consent with the Clerk of the Court.

§ 1104(a)(1)(A). To this end, plan participants have a significant interest in ensuring that fiduciaries properly and prudently administer the plan and manage plan assets.

Given the primacy of defined contribution plans in the American workplace, it is imperative that fiduciaries of ERISA-governed plans be held to a high standard of duty to manage plans prudently. Accordingly, resolution of the issues in this case will have a direct and vital bearing on the ability of plan participants to protect their retirement accounts from mismanagement and to ensure economic security in retirement. In light of the significance of the issues presented by this case, AARP respectfully submits this brief, as amicus curiae to facilitate full and thorough consideration by the Court.

SUMMARY OF ARGUMENT

Alarmist arguments that decry an outcome for the petitioners as a death knell for employee retirement plans are cast more heat than light. The ERISA duty of prudence requires fiduciaries of employer sponsored defined contribution plans to regularly monitor and re-evaluate long standing plan investment options. Industry standard of practice has borne out this requirement to include regular re-evaluation of investment share class and fees, a recommendation resoundingly echoed by responsible employers and retirement management consulting groups. Mutual funds are not an outlier, and should be included in the regular review process.

A formalized legal requirement to evaluate existing investment options for imprudent fees will not weaken the 401(k) system. Rather, it merely embraces the procedures that plan sponsors and their fiduciaries should already be following. Furthermore, employers' own interests are served by continuing to offer retirement programs that attract and aid in maintaining a productive work force. Judicial affirmation of a fiduciary duty for an accepted best practice poses no burden on employer plan sponsors, nor does it threaten to erode their willingness to offer 401(k)s.

Requiring periodic fiduciary consideration of mutual fund fees as part of a prudent investment evaluation merely recognizes a fiduciary duty that is already embraced as standard practice.

ARGUMENT

I. CLAIMS THAT A RULING IN PETITIONER'S FAVOR WILL AMOUNT TO A DEATH KNELL FOR THE 401(K) PLAN ARE WHOLLY UNREALISTIC.

ERISA imposes a fiduciary duty of prudence on sponsors and administrators of defined contribution plans. Section 404, 29 U.S.C. § 1104 (2012). Professional standards, legal precedent, and common sense dictate that the ERISA mandated duty of prudence includes an ongoing obligation to monitor a plan's investment options, such as they may be, from time to time. A handful of self-professed plan advocates would argue that petitioners seek to

saddle plan fiduciaries with a dramatic and arduous new burden and paralyzing legal exposure. The claim is that expanding fiduciary duty will sound the death knell for individual account retirement plans. These commentators warn that holding fiduciaries liable for their failure to evaluate existing investments will open the floodgates to "hugely disruptive" lawsuits that may result in "employers just cutting out their retirement benefits as a response." *See* John Manganaro, *Experts See Big Stakes in SCOTUS Review of Tibble*, Plansponsor, (Oct. 6, 2014), http://www.plansponsor.com/Experts_See_Big_Stakes_in_Supreme_Court_Review_of_Tibble.aspx.

The critics of defining plan fiduciary duty to include the regular and periodic assessment of existing investments draw no support from logic or in industry practice. Concomitant with the responsibilities of a defined contribution plan fiduciary is the aspiration that plan investment options provide the best attainable value to plan participants. *See* 29 U.S.C. § 1001(b) (under ERISA, the fiduciary duty of a defined benefit plan administrator is to "protect the interests of participants in employee benefit plans and their beneficiaries..."). An administrator that does not regularly monitor the share class and fee structure of investment options offered under his watch is plainly neglecting his fiduciary duty of prudence under ERISA, and thus falling short of accepted professional standards. Petitioners' claims essentially seek to align judicial analysis of ERISA conduct standards with responsible plan fiduciary practice standards customarily applied in the industry.

A. The ERISA Fiduciary Duty Of Prudence Applicable To Defined Contribution Plan Administrators Already Encompasses A Duty To Monitor Plan Investment Options.

ERISA and existing industry standards of practice impose a duty to regularly monitor plan investment performance, including the level and appropriateness of applicable fees. ERISA "establish[s] standards of conduct, responsibility, and obligation for fiduciaries of [those] plans." 29 U.S.C. § 1001(b). In order to carry out that policy, ERISA requires that the fiduciary "defray[] reasonable expenses of administering the plan," 29 U.S.C. § 1104(a)(1)(A)(ii), and act "with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use...." In other words, ERISA requires a trustee to exercise the skill and knowledge of an informed investor, or to ensure that designated plan administrators and the consultants whom they engage actually use the skill and expertise for which they were hired to analyze the relative values of investment options offered under the benefit plan. A reasonably informed person exercising "skill, prudence, and diligence" to minimize plan expenses should be expected to periodically evaluate the cost factors inherent in the plan's investment options.

The Department of Labor (DOL) explicitly recognizes the requirement to regularly monitor investment offerings. DOL regulations define the

standard of conduct to include a duty to review the performance of plan trustees and other fiduciaries "at reasonable intervals" and "as may be reasonably expected to ensure that their performance has been in compliance with the terms of the plan and statutory standards, and satisfies the needs of the plan." 29 C.F.R. § 2509.75-8 (2007). What constitutes a "reasonable interval" will vary by circumstances, but not to such an extent that a six year statute of limitations could run before an evaluation is required. *See Lingis v. Motorola, Inc.*, 649 F. Supp. 2d 861, 882 (N.D. Ill. 2009) (the court allowed a one year evaluation interval but opined that situations might exist where even this frequency of review is too scant).

The duty to monitor is also recognized by solid jurisprudence. For thirty years, the Seventh Circuit has recognized that a plan fiduciary has "a duty to monitor appropriately the administrator[] actions." *See Leigh v. Engle*, 727 F.2d 113, 135 (7th Cir. 1984) (recognizing that "fiduciaries responsible for selecting and retaining their close business associates as plan administrators...[have] a duty to monitor appropriately the administrators' actions.") (citing to 29 U.S.C. §§ 1104(a)(1), 1105(a) and 1105(c), and Restatement (Second) of Trusts §§ 184, 224 (1959)). *See also Lingus*, 649 F Supp. 2d at 882 ("The duty to monitor is thus a natural extension of the duty to appoint and remove plan fiduciaries."). The court in *Leigh* held that, although fiduciary duty does not require an examination of every action by a plan administrator, it does oblige "prudent and reasonable action to determine whether the administrators were

fulfilling their fiduciary obligations." 727 F.2d at 153. *See, e.g., Harris v. Koenig*, 602 F. Supp. 2d 39 (D.D.C. 2009) (recognizing that monitoring duties of appointing fiduciaries under ERISA are well established, and that "the power to appoint and remove trustees carries with it the concomitant duty to monitor those trustees' performance.") (quoting *Liss v. Smith*, 991 F. Supp. 278, 311 (S.D.N.Y. 1998).

The duty to monitor includes ensuring that plan administrators correct imprudent investments. *See Howell v. Motorola, Inc.*, 633 F.3d 552, 567 (7th Cir. 2011) ("agree[ing] with the position taken by the Secretary of Labor...that the selection of plan investment options *and the decision to continue offering* a particular investment vehicle are acts to which fiduciary duties attach...."). (emphasis added). The Fourth Circuit agreed that a fiduciary has a responsibility to ensure imprudent options are not offered to plan participants. *See DiFelice v. U.S. Airways, Inc.*, 497 F.3d 410, 418 (4th Cir. 2007) ("a fiduciary of a defined contribution, participant-driven, 401(k) plan ... who is given discretion to select *and maintain* specific investment options for participants—must exercise prudence in selecting *and retaining available* investment options.") (emphasis added).

Petitioners are not advancing a novel plan administration concept. Notably, in a client advisory the nationally prominent law firm Bryan Cave advises plan sponsor clients to meet at least quarterly "to consider information regarding performance, selection, and oversight of plan

investments" and to "establish a policy for ongoing plan expense and fee monitoring." Lisa Van Fleet and Carrie Byrnes. *Top Ten New Year's Resolutions for Retirement Plan Fiduciaries*, Benefits Bryan Cave (Jan. 2, 2014) http://benefitsbryancave.com/top-ten-new-years-resolutions-for-retirement-plan-fiduciaries/. Petitioners' seek to hold respondents to no larger duty.

Even when a plan sponsor delegates its responsibility to oversee the plan, the plan sponsor is not relieved of its duty to monitor. *See Leigh*, 727 F.2d at 135 ("[Defendants] could not abdicate their duties under ERISA merely through the device of giving their lieutenants primary responsibility for the day to day management of the trust."). The inability to delegate the duty to monitor is recognized by private industry as well. *See* United Ret. Plan Consultants, *Delegating Fiduciary Risk and Responsibility*, *available at* http://www.unitedretirement.com/docs/default-source/news-articles/default-document-library/delegating-fiduciary-responsibilities.pdf?sfvrsn=6 (last visited Dec. 3, 2014) ("Because the selection *and subsequent monitoring* of service providers is a fiduciary duty itself, Plan Sponsors can never entirely delegate their fiduciary responsibilities.") (emphasis added).

B. The Act Of Monitoring Existing Plan Investments Makes No Exception For Mutual Funds That Are Longstanding On The Plan's Investment Menu.

Given that the majority of 401(k) funds use mutual funds to stock their plans, prudence requires continual and systematic review of mutual funds in the plan investment menu regardless of acquisition date. Department of Labor regulations and guidance are clear that there is no exception to the duty to monitor simply because a mutual fund is longstanding on an investment menu. Market variables, historic performance, management details, fees and expenses, and other factors each impact the assessment of the ongoing soundness of an investment choice. *See* Securities and Exchange Commission, *Invest Wisely: An Introduction to Mutual Funds*, http://www.sec.gov/investor/pubs/inwsmf.htm (last visited Dec. 3, 2014) ("Mutual funds are **not** guaranteed You can lose money by investing in mutual funds.") (emphasis in original).

The suitability of the investment vehicle for the plan is always a necessary and proper subject of current concern. The criteria for judging an investment's risk of financial harm, and the reasonableness of its expense ratio, are not tied to the date the investment was initially selected for inclusion in the plan. The duty to monitor and reassess at a reasonable frequency is constant. *See, e.g.*, *DiFelice* at 423 ("[A] fiduciary must initially determine, and continue to monitor, the prudence of each investment option available to plan

participants. Here, the relevant 'portfolio' that must be prudent is each available Fund considered on its own."); *Chao v. Trust Fund Advisors*, No. 02-559, 2004 U.S. Dist. LEXIS 4026 at *13 (D.D.C Jan. 20, 2004) ("[W]hile a fiduciary may consider the prudence of an individual investment in the context of the 'whole portfolio,' such considerations do[] not immunize or permit any individual investment to be less than prudent.").

Mutual fund fees are a key consideration for fiduciaries that require regular monitoring. Department of Labor guidance specifically addresses the fiduciary's ongoing monitoring obligation to ensure plan investment fees are reasonable. *See Understanding Retirement Plan Fees and Expenses*, United States Department of Labor Employee Benefits Securities Administration, http://www.dol.gov/ebsa/publications/undrstndgrtrmnt.html (last visited Dec. 8, 2014) ("[E]valuating plan fees and expenses ... is an important part of the fiduciary's responsibility. This responsibility is ongoing."). In addition to considering fees during the initial selection of a fund, fiduciaries must regularly reassess fee structure. *See Meeting Your Fiduciary Responsibilities*, United States Department of Labor Employee Benefits Securities Administration (last visited Dec. 8, 2014), http://www.dol.gov/ebsa/publications/fiduciaryresponsibility.html ("fees and expenses should be monitored to determine whether they continue to be reasonable."). Additionally, mutual fund investments carrying higher fees may not deliver better results than lower-cost index funds. Burten G. Malkiel, *A Random Walk Down Wall*

Street 400 (1999) ("The important point to realize is that mutual-fund asset performance bears no relationship to the expenses charged. Although you may 'pay for what you get' in some products, you don't buy any better investment management by paying high fees. Quite the opposite—high fees lead to inferior investment performance.").

Many retirement plans retain mutual funds for years after making the initial investment. *See* Jacklyn Wille, *High Court to Address Statute of Limitations For Suits Challenging Retirement Plan Fees*, Bloomberg BNA Pension & Benefits Reporter, Oct. 7, 2014, http://www.bna.com/high-court-address-b17179895745/. And although plan sponsors and fiduciaries likely employ periodic review process, *see* Part C, *infra*, for some, these procedures often do not dictate a critical review of the reasonableness of administration and investment fees. *See 10 things you're [probably still] doing wrong as an ERISA fiduciary*, Plansponsor.com, 34 (October 2011) *available at* http://www.ifebp.org/inforequest/0161208.pdf ("They do not compare their fees with those that are being paid by similar plans for similar services."). The Ninth Circuit's ruling rubber stamps a continuation of this neglect, virtually erasing significant elements of the plan fiduciary's duty to monitor by absolving them of the requirement to monitor the fee profiles of longstanding funds—leaving a gaping hole in the protection ERISA intended to provide for employee retirement plans.

Mutual funds by nature are a tricky and constantly fluctuating investment that necessitates

regular monitoring. *See* Lawrence Jones, *Anatomy of a Mutual Fund Disaster*, Morningstar.com (Jul. 14, 2008), http://news.morningstar.com/articlenet/article.aspx?id=243683. Shifting market variables can drastically impact the value of a given mutual fund. For example, a proliferation of internet-centric mutual funds in the late 1990s plummeted, and in some cases folded altogether, after the dotcom bubble burst in 2000. *See* Evelyn M. Rusli and Verne Kopytoff, *Investing Like It's 1999*, NYTimes.com, (March 27, 2011 3:12 PM), http://dealbook.nytimes.com/2011/03/27/is-it-a-new-tech-bubble-lets-see-if-it-pops/?_r=0 (Merrill Lynch debuted a notorious fund—Merrill Lynch Internet Strategies Fund—that lost 70% of its $1.1 billion investment assets a year after creation.). *See also* Rob Silverblatt, *The Decades' 10 Worst Fund Disasters*, U.S. News & World Report, (Dec. 30, 2009), http://money.usnews.com/money/blogs/fund-observer/2009/12/30/the-decades-10-worst-fund-disasters. Similarly, the recent mortgage crisis, and subsequent investor flight from financial sector and asset-backed securities markets, caused roughly 65% and 80% declines in two funds touted as "low risk." *See* Lawrence Jones, *From Difficult to Disaster: Redemptions' Impact on Funds*, Morningstar.com, http://money.usnews.com/money/blogs/fund-observer/2009/12/30/the-decades-10-worst-fund-disasters (Feb. 07, 2008).

Funds that are longstanding on a plan menu are not immune to the market pressures described above, and thus require the same vigilant fee monitoring as new acquisitions. *See* Donald Stone,

Investment Selection and Monitoring: A Practical Approach to Best Practices, 401khelpcenter.com, http://www.401khelpcenter.com/401k/stone_investment_selection.html#.VIXovPnF_zi (last visited Dec. 4, 2014) [hereinafter Stone. Investment Selection] ("Quarterly reporting and continuous monitoring should be the standard for all but the smallest plans where this may not be financially feasible."). Absolving a plan fiduciary of the duty to regularly monitor and reassess the viability and benefit of all funds offered for employee investment does not serve the "best interests of the participants" in a constantly, and at times rapidly, evolving market. This is the type of negligence the fiduciary duty is intended to prevent.

C. Savvy Employers, Legal Practitioners, And Consultants Who Specialize In Advising Plan Fiduciaries Conduct Regular Review Of Existing Investment Options In The Normal Course Of Business.

Application of the fiduciary duty of prudence to require fee scrutiny of investment offerings that have outlasted the ERISA statute of limitations is not earth shattering. More than likely, employers perceive this regimen as a barely perceptible tremor that simply echoes the current practices of responsible plan sponsors and retirement plan consulting specialists.

The need for regular monitoring of investments in employer sponsored retirement plans is also ubiquitous in the marketing materials of

major consulting groups. Morgan Stanley's Consulting Group advises fiduciaries of employer sponsored retirement savings plans that they are legally charged with demonstrating prudence in selecting and monitoring investment decisions. A responsible exercise of this duty includes, among other factors, a consideration of asset class and accompanying fee structure. *See* Morgan Stanley Consulting Group, *Investment Consulting Advice for Your Retirement Plan* (Aug. 2013) *available at* http://www.morganstanleyfa.com/public/projectfiles/0ae45459-9693-4d86-8b24-adb5a664125b.pdf.

Morgan Stanley continues to emphasize the importance of monitoring by touting the many analytic tools the firm offers to aid plan sponsors to "monitor[] fund performance." *Id.* at 2-3 (six-step investment process includes "Monitor Fund Performance" and specifies integrating a "detailed review of the investment options currently available" against your plan's investment policy criteria).

Similarly, JP Morgan directs plan sponsors to "periodically monitor plan investments and prudently evaluate whether to keep or replace them." JP Morgan Asset Managers, *Understanding Your Fiduciary Role* 11 (April 2014) *available at* https://www.jpmorganfunds.com/blobcontent/391/31/1323377781893_RI-FIDGUIDE-0414.pdf (hereinafter JP Morgan).

And most benefit plan consulting groups do the same, *See, e.g.*, GCG, gcgfinancial.net, (last visited Nov. 30, 2014) (boasting services including

regular review of performance, quarterly monitoring reports and coordination of investment selection and de-selection); Wealth Enhancement Group, http://wealthenhancement.com/individual/our-approa ch/ (last visited Nov. 30, 2014) (Specialists will "constantly assess industry news, economic perspectives, market opportunities and product introductions..."); Axia Advisory, www.axiaadvisory .com, http://www.axiaadvisory.com/retirement-plan-consult ing#5 (last visited Nov. 30, 2014). ("A review of the investment managers in the plan should be completed on a quarterly to semi-annual basis as ERISA expects the Plan Sponsor to monitor the investments for consistency with the [Investment Policy Statement]."); PlanPilot, Investment Monitoring, www.planpilot.com, http://www.planpilo t.com/investment-consulting/inve stment-monitoring (last visited Nov. 30, 2014) ("PlanPilot utilizes...performance and risk models, which enable clients to make performance comparisons versus peers and benchmarks, analyze style consistency and identify the sources of return and risk."). In short, the standard to which petitioners seek to hold respondent is *de rigeur* in the context of plan administration best practices.

D. The Task Of Reviewing Mutual Fund Share Class And Fee Attributes In The Course Of Periodic Plan Review Is An Insignificant Undertaking For Plan Sponsors And Administrators.

Review of share class and fee attributes are essential to prudent mutual fund investing and

should be incorporated into regular investment plan monitoring. Evaluation of these critical considerations is an imperceptible burden to a plan fiduciary's existing obligation to monitor fund performance. Decisions as to suitability of a class for investment can be made using information readily available in the fund prospectus. *See* Securities and Exchange Commission, *Mutual Fund Classes*, http://www.sec.gov/answers/mfclass.htm (last visited Dec. 8, 2014). Even a casual investor can use a cost calculator provided by the Securities and Exchange Commission to determine whether the costs are reasonable. Securities and Exchange Commission, *Calculating Mutual Fund Fees and Expenses*, http://www.sec.gov/investor/tools/mfcc/mfcc-int.htm (last visited Dec. 8, 2014) ("With just some basic information, you can use the tool to compare the costs of different mutual funds in a matter of seconds."). Plan fiduciaries, who are obligated to operate with the knowledge of a "prudent expert" should have little difficulty incorporating a quick evaluation of the cost basis of a mutual fund into their overall assessment. *See* Stephen D. Rosenberg, *Retreat from the High Water Mark: Breach of Fiduciary Duty Claims Involving Excessive Fees After Tibble v. Edison International*, 18 J. OF PENSION BENEFITS 12, 18 (2011) [hereinafter Rosenberg, Retreat from the High Water Mark) ("[Plan fiduciaries ... are to act as a reasonably prudent person who is knowledgeable with regard to the investment options, something often referred to as a 'prudent expert' standard.").

Even if ongoing monitoring of existing funds cannot be as thorough as is done at the time of initial selection, the ease with which a fiduciary can evaluate share class and fee data renders failure to divest funds with unnecessarily high fees unacceptable. The Ninth Circuit astutely held that purchasing retail class shares when identical institutional class shares are available at a lower price violates the fiduciary duty of prudence. *See Tibble v. Edison Int'l*, 711 F. 3d 1061, 1085, 1087 (9th Cir. 2014) (affirming the district court finding of a violation of prudence for three funds where "all three funds offered institutional options ... in the range of 24 to 40 basis points cheaper than the retail class options the Plan did include ...."). Failure to recognize that past fund selections are similarly imprudent, and are harmfully siphoning employee retirement income is just as egregious a failure of fiduciary duty as is selecting overpriced funds in the first place. *See* Rosenberg, *Retreat from the High Water Mark* at 18 ("There is no credible reason to believe that a reasonable expert in mutual funds or similar investment options would not know that a large dollar investor can do better, simply by basic negotiation, than can the general public as a whole."). Time of acquisition is not the relevant consideration; rather, prudence requires the plan fiduciary to recognize and remedy the offending investment.

Moreover, plan sponsors that delegate administration of their benefits plans to consultant groups or committees typically will do so through an expressed investment policy statement ("IPS") that guides plan administrators on how to stay legally

compliant with their fiduciary duty. *See* JP Morgan at 10 ("a properly drafted [IPS] can go a long way in helping fiduciaries fulfill their duties."). JP Morgan advises plan sponsors to create an IPS that dictates among other things, "a monitoring and replacement process." *Id.* Plan sponsors could therefore easily implement a fiduciary requirement to consider share class and mutual fund fees in the regular monitoring prescribed in their ISP.

Many companies conspicuously practice policies that proactively stave off imprudent mutual fund investments by banning retail class investment. Cigna Corporation has a past and future policy of eschewing needlessly higher cost investment products. *See Nolte v. Cigna Corp.*, No. 07-2046, 2013 U.S. Dist. LEXIS 101165, at *140, 244-45 (C.D. Ill. July 3, 2013). The settlement prohibited Cigna Plans from "offering retail mutual fund investment options or separately managed accounts which invest in retail mutual funds." *Id.* at *140. Additionally it stated that "[Cigna] has agreed to continue to exclude retail class mutual funds from the Plan's lineup—as it has since the 1990s." *Id.* at 244-45.

Even if the investment fees do not patently rail against the best interests of the participant, plan sponsors can, and should, determine the competitiveness of investment fees through simple peer comparison. A best practices guide for plan sponsors advises fiduciaries to benchmark, not only plan performance against its peer group, but also fee and expense ratios. *See* Stone, *Investment Selection* ("expenses or manager's fees should not be above the

medium of its peer group."). Case law has gone beyond guidance in at least one circuit. In *Tussey v. ABB, Inc.*, the Eighth Circuit held that fiduciaries can breach their duty of prudence in part by neglecting to "determine whether [the investment company's] pricing was competitive" and by failing to "adequately leverage the Plan's size to reduce fees. 746 F.3d 327, 336 (8th Cir. 2014).

Additionally, plan fiduciaries have the option, which many exercise, to use expert consultants to determine the reasonableness of an investment's fees. *See* John M. Chavez, *White Paper: ERISA Fiduciary Responsibility: Fiduciary Reliance on Registered Investment Advisers*, Multnomah Group, http://www.multnomahgroup.com/fiduciary-reliance-on-registered-investment-advisers-white-paper (last visited Dec. 8, 2014) ("A qualified consultant can educate the plan sponsor on the services and expenses that are appropriate for a plan of a given size and can advise the plan sponsor on opportunities as the plan grows."). In the wake of the Court electing to hear this case, one benefits consultant advises, "[t]he sponsor simply needs to select the share class that provides the lowest net cost to the participant." Doug Conkel, *Tibble vs. Edison: What it will mean for plan sponsors and fiduciaries*, Retirement Town Hall (Oct. 16, 2014), http://www.retirementtownhall.com/?p=6532#sthash 0tfd6UO9.dpbs. He continues by "encourag[ing] sponsors to study up on their plan's fee arrangements, fee-leveling, and other best practices within the industry." *Id.* All of this advice is eminently sensible and it is a far cry from novel or

cumbersome. Plan fiduciaries simply incorporate this readily accessible factor into the required monitoring process directed at existing plan investments, clearly an action that any prudent investor would reasonably undertake.

E. Claims That Inclusion Of An Ongoing Duty To Police Share Class And Fee Attributes Within The ERISA 401(k) Fiduciary's Duty Of Prudence Will Impact Employers' Willingness To Implement And Maintain 401(k) Plans Are Wildly Rash And Unfounded.

When it comes to recruiting and retaining employees over the long term, "not having a retirement plan is a glaring hole," Sabrina Parsons, executive of Palo Alto Software, said. "It's like restrooms in the office; you can't not have them." Sarah Max, *Many Reasons to Offer 401(k)s (Including Owner's Retirement)*, NYTimes.com (July 30, 2014) http://www.nytimes.com/2014/07/31/business/smallbusiness/Setting-up-a-401-k-plan-at-a-small-business.html?_r=0.

A decision for the petitioner will not cause employers to jettison their 401(k) plans. Benefits packages, including 401(k)s, are deeply embedded in the American employment culture, and are an integral part of employer recruiting and retention policies. According to the Bureau of Labor Statistics, 74% of full-time private industry employees have access to retirement benefits. *See* News Release, Bureau of Labor Statistics, *Employee Benefits in the*

United States (July 25, 2014) www.bls.gov/ncs/ebs/sp/ebnr0020.pdf. Nearly 50% of all business establishments offer a defined contribution plan. *See* Bureau of Labor Statistics, Employee Benefits Survey, Table 1 (March 2014), http://www.bls.gov/news.release/pdf/ebs2.pdf. A survey conducted by the Center for Advanced Human Resources found extrinsic rewards—a category inclusive of retirement benefits—to be the second most frequent reason cited by employees when asked why they stay with an employer. John Hausknecht et al., *Targeted Employee Retention: Performance-Based and Job-Related Differences in Reported Reasons for Staying* 18-19 (Center for Advanced Human Resource Studies, Working Paper Series, 2008), *available at* http://bit.ly/1B3KbMN (extrinsic rewards cited 41% of the time). *See also* MetLife, *Benefits Breakthrough: How Employees and Their Employers are Navigating an Evolving Environment* 2 (2014), *available at* https://benefittrends.metlife.com/assets/downloads/benefits-breakthrough-summaries-2014.pdf [hereinafter MetLife] ("Study finding a significant rise in the number of employees who agree that benefits are a very important reason they joined and/or stayed with their company."). The extent of 401(k) benefits offered by companies is of such importance to prospective employees that Bloomberg Businessweek recently began publishing a ranking list of which U.S. companies offer the best 401(k) plans. *See generally*, Margaret Collins and Carol Hymowitz, *Who's Got the Best Retirement Plan?*, businessweek.com, (July 24, 2014), http://www.businessweek.com/articles/2014-07-24/401-k-s-which-companies-have-the-best-retirement-pla

ns (ranking 401(k) plans among 250 of the largest U.S. employers).

Employers, likewise, derive tremendous utility from offering 401(k) plans. U.S. News describes an employer's motivation for offering a 401(k) as "primarily to attract the best employees in the most cost-efficient manner possible...." Emily Brandon, *6 Ways to Measure the Success of a 401(k) Plan*, U.S. News & World Report, (Jan. 31, 2011), http://money.usnews.com/money/blogs/planning-to-retire/2011/01/31/6-wavs-to-measure-the-success-of-a-401k-plan (citing MetLife study). A spokesperson for Phillip Morris International explained their generous 401(k) program from a practical business perspective: "A robust retirement package for our U.S. personnel is essential to ensuring that we can attract, motivate and retain the best global talent." Margaret Collins and Carol Hymowitz, *The Best 401(k)s: Retire at 60 From Conoco with $3.8 Million; Facebook Last*, Bloomberg.com, (July 22, 2014), *available at* http://bloom.bg/1rn9SSp. Younger companies too, like Facebook, indicate a desire to grow, rather than limit, 401(k) benefits. *See id.* (Facebook expressed an intention to offer 401(k) matching contributions by April 2014. Stating in a letter to Bloomberg Businessweek: "We take a comprehensive approach to the benefits we offer all our people, which includes a robust 401(k) match...").

Given the value placed on 401(k) benefits by employees, and the undeniable financial benefits perceived and realized by employers through offering these plans, the claim that employers will cease

offering 401(k)s merely because the Court recognizes a duty of ongoing evaluation of share class and fee attributes—something that many companies routinely now do—is highly suspect and eminently unreliable.

CONCLUSION

For all of the foregoing reasons AARP submits that the Court should recognize that ERISA defined contribution plan fiduciaries are bound by their duty of prudence to periodically monitor mutual fund fees and expenses, and that failure to do so is actionable. The Ninth Circuit's decision should be reversed.

Respectfully Submitted,

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AMICUS CURIAE BRIEF

No. 13-550

In the Supreme Court of the United States

GLENN TIBBLE, *et al.*,
Petitioners,

v.

EDISON INTERNATIONAL, *et al.*,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF CAMBRIDGE FIDUCIARY SERVICES LLC AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

Cambridge Fiduciary Services, LLC ("CFS") provides fiduciary consulting and fiduciary assessment services regarding conformity with fiduciary standards of care to those responsible for managing other people's investments. CFS has provided these services to an affiliated registered investment advisor and its clients with $24.6 billion in assets and to other entities responsible for the management of $62.8 billion in assets. Many of the clients advised by CFS sponsor ERISA retirement plans. CFS's services are rooted in prudent investment practices that achieve a fiduciary standard of excellence, sometimes referred to by investment professionals as "best practices."

CFS was formed in 2009 as part of Cambridge Financial Services Group ("Cambridge"), an employee benefits and investment advisory firm established in 1983. CFS was organized to provide fiduciary consulting services to Cambridge's investment advisor and other clients. CFS counseled various Cambridge clients on fiduciary practices, including multiple defined contribution plan sponsors.

CFS's role on behalf of Cambridge and its clients continued until June 2013, when the investment advisory business of Cambridge was purchased by Cap-

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amicus* represent that they authored this brief in its entirety and that none of the parties or their counsel, nor any other person or entity other than *amicus*, its members, or its counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Pursuant to Rule 37.3(a), counsel for *amicus* represents that all parties have consented to the filing of this brief. *See* Respondents' Consent to the Filing of Amicus Curiae Briefs (Nov. 24, 2014).

trust Financial Advisors. At the time of sale, Cambridge had $2.6 billion in assets under care, including one 401(k) plan with $1.25 billion in assets and another with $260 million in assets. Cambridge had additional clients with approximately $22 billion in assets for whom Cambridge provided regular investment advisory and fiduciary services.

According to the Investment Company Institute, the 401(k) plan retirement system held $4.4 trillion in assets as of March 2014 on behalf of more than 52 million active participants and millions of former employees and retirees.[2] These constituents rely on plan fiduciaries to act as "prudent experts" in the management of plan assets. As an organization performing fiduciary assessments of the conformity of plan sponsors and their advisors to a fiduciary standard of care and providing fiduciary advice on such conformity, CFS is concerned about evolving and improving the fiduciary standard of care and concerned that the rule adopted by the Ninth Circuit will diminish such standards of care and threaten recent progress in reducing fees because the rule will erode the duty to monitor retirement plan fees on an ongoing basis.

SUMMARY OF ARGUMENT

CFS's experience in advising and counseling ERISA fiduciaries and its knowledge and understanding of prevailing and evolving best practices and

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[2] Investment Company Institute, "The U.S. Retirement Market, Second Quarter 2014", at 2 http://www.ici.org/research/stats/retirement/ret_14_q2; last viewed Nov. 30, 2014.); Investment Company Institute, "Frequently Asked Questions About 401(k) Plans, October 21, 2014, at 1, (available at http://www.ici.org/faqs/faq/faqs_401k.; last viewed Nov. 30, 2014).

standards of care yields four key observations: (1) many plan fiduciaries, especially among large plans, already follow good monitoring practices, meaning that reversing the Ninth Circuit will not result in increased costs for these fiduciaries or their employers; (2) the cost of regular monitoring includes a small amount for "benchmarking" plan fees in all service categories—investment, administration, trustee, consulting, and the like, and is, in many cases, largely born by plan participants, not employers or fiduciaries; (3) the Ninth Circuit's decision threatens to erode the past decade's progress on fee reductions in defined contribution plans, driven in part by private lawsuits, which has saved plan participants billions of dollars; and (4) the Ninth Circuit's standard of "material" changed circumstances is unworkable and illogical.

ARGUMENT

I. Reversing the Ninth Circuit Will Not Result in Materially Higher Costs of Plan Administration.

CFS has advised many employer fiduciaries who administer defined contribution plans that they sponsor as well as the investment consultants who in turn advise these plan fiduciaries. It has been CFS's experience that many such plan fiduciaries and their investment consultants follow or counsel best fiduciary practices. For those plan sponsors, reversing the Ninth Circuit will have little or no impact because they have already adopted the prevailing standards of care and absorbed the commensurate costs (to the extent that they do not pass those costs on to the plan). Further, in CFS's experience, the cost of benchmarking investment fees and expenses form a small part of

the total costs of vigilance and prudence, which are born, in large measure, by plans, not plan sponsors. For those plan sponsors and plan fiduciaries who do not currently follow best practices, CFS does not believe it is a lot to ask that they spend a little more time every year minding their plans' fees and expenses—especially since they pass on much of the costs of such monitoring to their plans in any event. CFS suspects that plan participants are more than willing to bear some incremental costs of fiduciary vigilance in exchange for lower fees.

A. CFS Has Many Years of Experience Advising both Retirement Plan Fiduciaries and Their Investment Consultants.

CFS's fiduciary services to Cambridge clients were designed to promote client conformity to a fiduciary standard of care consistent with ERISA's "prudent expert" standard. Fiduciary services included preparing investment policy statements ("IPS"), counseling on the fiduciary responsibilities of investment committees, and periodic attendance at investment committee meetings. These fiduciary services complemented Cambridge's investment advisory services, which were themselves based on a fiduciary standard of care and performed in a fiduciary capacity, as overseen by CFS.

When clients opted for mutual funds, Cambridge was responsible for recommending the share class appropriate to the client's needs. This was generally the share class with the lowest expense ratio.

Cambridge clients were also advised that, following initial selection of a fund or manager, there was a duty to monitor on a periodic basis, generally annu-

ally, to verify that the initial selection remained prudent and in the best interests of plan participants. Fee monitoring takes into account the amount of plan assets (for purposes of leveraging bargaining power and the availability of price breaks), the cost of administration, and the fiduciary duty to control and account for plan fees and expenses. Without such monitoring a plan fiduciary might not realize, for example, that payments to a plan's record-keeper from revenue sharing exceed the reasonable costs of plan administration. Or a plan fiduciary might forego opportunities to fix past mistakes.

CFS also performs fiduciary certification assessments on behalf of CEFEX, the Centre for Fiduciary Excellence. CEFEX is an independent global assessment and certification organization dedicated to assisting investment fiduciaries (investment committees, investment advisors and asset managers) in adhering to the highest standards of fiduciary excellence in their particular investment function. CEFEX determined that standardization is essential to achieving global acceptance of the principles of fiduciary excellence because a standard approach provides investors with consistent and unbiased methodologies. CEFEX uses the International Organization for Standardization (ISO) 19011 standard for performing assessments.

The CEFEX certification of a qualified plan, including 401(k) plans, is based on the fiduciary standard described in the handbook Prudent Practices for Investment Stewards. For investment advisors, CEFEX bases certification on the handbook Prudent Practices for Investment Advisors. Both are published

by fi360[3] of Bridgeville, Pennsylvania, and contain 21 best practices, including supporting criteria, describing how an investment fiduciary can prudently manage the investments for which it is responsible. Each practice is substantiated by ERISA, the Uniform Prudent Investor Act, the Uniform Prudent Management of Institutional Funds Act, the Uniform Management of Public Employee Retirement Systems Act and the Investment Advisors Act of 1940. (Collectively, the Prudent Practices applicable to Investment Stewards and to Investment Advisors are referred to herein as "the Practices".)

CEFEX assessments of fiduciary oversight are performed by analysts appointed by CEFEX. Such analysts must earn the Accredited Investment Fiduciary Analyst™ or AIFA® designation awarded by fi360 (a founding CEFEX member) after a period of study and examination and demonstrate prior investment industry experience. Today, there are some 40 CEFEX analysts, including one of CFS's principals.

These assessments verify whether an entity conforms to a fiduciary standard of excellence—"best practices" if you will. Satisfactory completion of an assessment results in CEFEX issuing a certificate attesting to an entity's conformity with the standard. Certification is annual. CFS currently performs these assessments for a multiemployer pension fund ($160 million in assets), the registered investment advisors of four major independent broker/dealers ($62 billion

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[3] The Practices were first published in 2003 and were updated in 2006 and 2013. *See* http://www.fi360.com/about-fi360/history (last viewed Dec. 8, 2014).

in assets, much of it represented by 401(k) plan assets) and two other investment advisory firms ($822 million in 401(k) assets).

Over 8,000 fi360 advisor designees are committed to applying the Practices in their advisory activities. CEFEX has certified over 65 advisory firms as conforming to the Practices. These advisory firms are collectively responsible for over $140 billion in assets,[4] of which $81 billion represents ERISA defined contribution plan assets. These advisory firms have, in turn, provided counsel with respect to the Practices to their plan fiduciary clients, which include some 5,096 defined contribution plans.

B. Many Plan Fiduciaries Are and Have Been Vigilant and Diligent.

The notion that overruling the Ninth Circuit will compel plan fiduciaries to do a lot more than they have been doing to protect themselves from lawsuits is bogus. It is CFS's experience that at many, if not most, large plans with over $250 million in assets the plan fiduciaries already follow appropriate standards of monitoring fees. For these fiduciaries, there is no increased cost in vigilance *because they are already doing it*. And it is these large plan fiduciaries, motivated in part by good intentions, but also by fee litigation since 2006 and Department of Labor rulemaking, that have helped to drive down retirement plan fees in virtually all market segments, which has benefited all plans and their participants generally.

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[4] This does not include the additional $62 billion in broker/dealer advisory assets overseen by CFS.

Further, the standard employed by CEFEX, which many plan fiduciaries and their respective investment consultants and advisors follow, command diligence in monitoring fees, investments, and vendors. The fi360 Handbooks offer a practical approach to framing the issue. They separate the Practices and supporting criteria into a four step process that together constitute a Fiduciary Quality Management System. One of those four fundamental steps is monitoring. As the Handbooks explain:

> No one should be lulled into thinking that the 'heavy lifting' was done [at selection] and the client portfolio is now on 'auto pilot,' marked only by periodic re-balancing, quarterly performance reports, and routine client meetings.

Practice 4.4 and its Criteria are especially relevant to the monitoring issues in this case:

> Practice 4.4 - "Periodic reviews are conducted to ensure that investment-related fees, compensation, and expenses are fair and reasonable for the services provided."
>
> > Criterion 4.4.1 - "A summary of all parties compensated from the portfolio or from plan or trust assets and the amount of compensation has been documented."
> >
> > Criterion 4.4.2 - "Fees, compensation, and expenses paid from the portfolio or from plan or trust assets are periodically reviewed to ensure consistency will all applicable laws, regulations, and service agreements."
> >
> > Criterion 4.4.3 - "Fees, compensation, and expenses paid from plan or trust assets are

> periodically reviewed to ensure such costs are fair and reasonable based upon the services rendered and the size and complexity of the portfolio or plan."

The thousands of fi360 advisor designees and 65 CEFEX certified advisory firms already counsel their clients to conform to the monitoring required by these Practices.

C. Vigilance and Diligence in Monitoring Are Not Expensive.

In our experience, large plans, *i.e.*, plans exceeding $250 million in assets, are typically administered by a committee consisting of three or more of the plan sponsor's officers or managers. These committees typically meet quarterly for a few hours to review the company's retirement plans. The committee members may spend a couple of additional hours in advance of a meeting reviewing briefing materials that will be presented at the meeting. One or a few of the sponsor's employees may be tasked with supporting the committee, preparing briefing materials, and working with investment managers, vendors, consultants, and the like. Such employees often attend committee meetings.

In addition, many committees hire independent consultants (such as Cambridge and CFS) to assist in vendor selection and monitoring. A typical committee meeting involves investment performance review, new investment evaluation and manager searches, other vendor reviews, particular issues of concern, and the like. Less frequently, full fee and vendor reviews are conducted, typically referred to as "benchmarking." Best practice is to conduct a detailed fee review annually. To be sure, monitoring activities in

general are not without cost. Vigilant committee members, all of whom generally have important jobs with the employer, may spend 25-50 hours a year on committee matters. Staff support may also require several full-time employees, especially for very large plans. And consultants are not cheap. For a large plan, the lost manager hours, staff compensation, and consultant fees are not insubstantial. That said, the plan often pays for employee staffing on plan administration and almost always pays for consultants who advise the plan fiduciaries.

Indeed, in the case before the Court, the investment committee retained Hewitt Financial Services to advise it. *Tibble v. Edison Int'l*, 729 F.3d 1110, 1138 (9th Cir. 2013). According to the Edison 401(k) Savings Plan Form 5500 for 2009, Hewitt was compensated by the plan for its services.[5] This is consistent with our experience where much of the monitoring costs are born by the plan and its participants, not the plan sponsor. More important to this case, the cost of benchmarking is a small part of a plan's total investment and administration expense. In fact, many investment advisors do not charge for benchmarking mutual funds, the investment vehicle involved here, because of readily available mutual fund data sources, such as Morningstar, and the relative ease of compiling a report.

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[5] 2009 Form 5500 Annual Return/Report of Employee Benefit Plan, Schedule C, page 3 (reflecting payments for recordkeeping, shareholder servicing, sub-transfer agency, distribution, and "other" services according to the listed service codes). This document can be located at https://www.efast.dol.gov/portal/app/disseminate?execution=e1s1. Type 951240335 into EIN field and 002 into Plan Number. The search will retrieve this plan's Forms 5500 and accompanying auditor's report.

II. Fee Litigation and the Prospect of Fiduciary Liability Have Resulted in Substantially Lower Defined Contribution Plan Fees.

In the middle of the last decade, the Department of Labor turned a spotlight on defined contribution plan fees and fiduciary oversight.[6] Beginning in 2006, dozens of lawsuits against fiduciaries for large plans alleging excessive plan fees have been filed, many settling for tens of millions of dollars. Several years later, New England Pension Consultants, LLC ("NEPC") summarized the findings of its annual defined contribution Plan & Fee Survey: "Fees related to retirement investment accounts hit a record low this year."[7] NEPC attributed declining fees in part to "well publicized litigation."[8] Much of that litigation would have stopped dead in the tracks had the Ninth Circuit's rule applied.

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[6] *See, e.g.*, *Meeting Your Fiduciary Responsibilities* (May 2004) (available at www.dol.gov/ebsa/publications/fiduciaryresponsibility.html) (last viewed November 30, 2014); *Understanding Retirement Plan Fees and Expenses* (May 2004) (available at http://www.dol.gov/ebsa/publications/undrstndgrtrmnt.html) (last viewed November 30, 2014).

[7] Defined Contribution Plan Fees Continue to Decline: 2013 NEPC Plan & Fee Study, at 1. ("NEPC 2013 Survey") (available at http://www.nepc.com/writable/research_articles/file/2013_09_nepc_dc_plan_fees.pdf; last viewed December 8, 2014).

[8] NEPC 2014 Defined Contribution Plan & Fee Survey: What Plan Sponsors Are Doing Now, at 1, ("NEPC 2014 Survey") (available at http://www.nepc.com/writable/research_articles/file/2014_10_nepc_2014_defined_contribution_plan_and_fee_survey-_what_plan_sponsors_are_doing_now.pdf; last viewed December 8, 2014).

In 2006, the first year of the NEPC survey and the first year with multiple fee-lawsuits, average record-keeping fees were $118 per plan participant and the median plan weighted average expense ratio was 57 basis points.[9] In 2014, the median per-participant record-keeping fee was $70 and the median plan weighted average expense ratio was 49 basis points.[10] In other words, record-keeping fees have declined 40% since 2006 and total plan fees have declined by 21%.

Similar trends are visible in mutual fund fees. Mutual funds are widely held by defined contribution plans. The Investment Company Institute ("ICI"), the trade association for the mutual fund industry, reported that over the past ten years, the average expense ratio (the total reported fees charged to a mutual fund) for actively-managed equity funds and index equity funds have declined, respectively, by 21 and 13 basis points.[11] Over the past five years, expense ratios for target date funds (funds that allocate and reallocate assets based on a projected retirement date) have declined from 67 basis points to 58 basis points—about 13.5%

The data are even more striking on an asset-weighted basis. From 2003 to 2013, asset-weighted fees fell in four mutual fund categories, as depicted in Table 1 below.[12]

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[9] 2014 NEPC Survey at 1.

[10] 2014 NEPC Survey at 3.

[11] ICI Research Perspective: Trends in the Expenses and Fess of Mutual Funds, 2013, May 2014, at 1 ("ICI Perspective") (available at http://www.ici.org/pdf/per20-02.pdf; last viewed December 8, 2014).

[12] *Id.* at 3, Figure 1.

Table 1

Year	Equity	Blend	Bond	Money Market
2003	100 bp	90 bp	75 bp	42 bp
2013	74 bp	80 bp	61 bp	17 bp
BP change	-26	-10	-14	-25
% change	-26%	-11%	-18.6%	-59.5%

The ICI attributes this trend in part to investor preference for lower-cost funds.[13] In the case of defined contribution plans where the funds are chosen by plan fiduciaries, this means that fiduciaries are driving the trend to lower investment management fees for their retirement plan participants. This is a good thing. CFS submits that fiduciary preference for low-cost investment options and decreased record-keeping fees are directly correlated to fee litigation against plan fiduciaries. Large plan sponsors and the financial services community have monitored fee litigation closely from the moment the first of these cases were filed in 2006. Consultants and lawyers alike have been emphasizing in the years since that conflict-free, regular scrutiny of fees is critical to avoiding suit. Several ERISA legal conferences a year devote substantial time to fee litigation. The Ninth Circuit's ruling threatens to reverse these real gains by immunizing fiduciaries from lawsuits over current fees that were set years prior.

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[13] *See, e.g.*, ICI Perspective, at 2 (equity investors shifting no no-load institutional shares and lower-cost index funds), 15 (investor preference for low-cost funds driving down fees for target-date funds).

Consider how these reductions in fees translate into real dollars for working Americans. Basic plan data from a retirement plan database illustrates the dollar impact of these fee reductions.[14] We identified 2,478 defined contribution plans with assets greater than or equal to $250 million. Collectively, these plans had 40,568,708 participants and $3.06 trillion in assets. If plan participants in these large plans in 2014 had paid the $118 per-participant record-keeping fee that was the norm in 2006 instead of than the median 2014 $70 per-participant fee (as reported in the NEPC surveys), they would have paid an additional $1.947 billion in record-keeping fees in 2014 alone.

The saved dollars on total plan fees are enormous as well. NEPC reported total defined contribution plan fees of 57 basis points in 2006 and 49 basis points in 2014, a difference of 8 basis points. That difference applied to the total plan assets of the large plan group equals $2.448 billion. In sum, *declining fees saved $2.448 billion in fees for about 40 million plan participants in 2014 alone.* Add in the fee savings for every other year since 2006, and the fee savings for all the plans with under $250 million in assets, and compound those savings over many years of investment returns, and it is apparent that tens of millions of

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[14] The Retirement Plan Prospector is a subscription database containing data for approximately 803,000 defined contribution plans. It can be accessed with a subscription at http://prospector.judydiamond.com/. The data comes largely from the Forms 5500 and accompanying financial statements filed annually by retirement plans with the Internal Revenue Service and Department of Labor. Virtually every data point on the Form 5500 can be searched.

Americans have benefited and will benefit from pressure on fees by receiving increased retirement income. These savings were driven in part by fee litigation. The accumulated fee savings over time are very valuable to individual retirees, as depicted in the following figure.

Figure 1

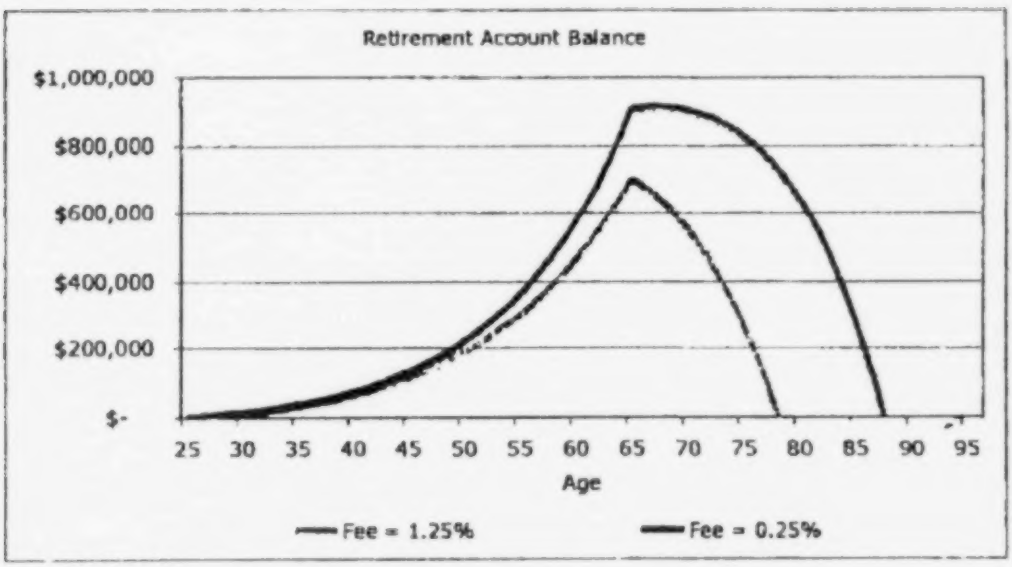

Figure 1 depicts the portfolio trajectory for a typical employee in a defined contribution plan. In this example, an individual starts saving at age 25 and continues to participate until age 65. At that time, savings are withdrawn until the balance reaches $0. As illustrated, the effective life of the assets moves from age 88 to age 78 if fees are increased by 100 basis points.[15] Even a difference of 10 basis points in fees

[15] A note about other assumptions in this analysis: The plan participant in this analysis earns $40 thousand per year and saves 5% annually towards retirement. Inflation is assumed to be 2.5%, which increases salary and annual contributions accordingly. Investment returns are assumed to be 9%, and at retirement in this analysis, the participant withdraws 70% of her projected salary on an inflation adjusted basis.

adds substantially to retirement savings over time. Assuming all the same conditions for the typical employee depicted in Figure 1, except a difference of 10 basis points in fees instead of 100, the employee would still enjoy eighteen additional months of retirement income. That may not sound like a lot, but CFS thinks eighteen additional months of retirement income security is very meaningful to a 78-year old American on a fixed income. Fees matter a lot.

In sum, the increased administrative cost of fee benchmarking, which we discussed above, pales in comparison to the fee savings achieved over the past several years.

III. The Ninth Circuit's Standard Is Unworkable and Illogical.

In *Tibble*, the Ninth Circuit held that a plaintiff may evade the statute of limitations for investments selected outside the limitations period by showing "changes in conditions occurred within the limitations period that should have prompted a full due diligence review of the funds, equivalent to the diligence review Defendants conduct when adding new funds to the Plan." 729 F.3d at 1120 (quotation omitted). This rule makes little sense in practice.

First, it is not at all clear what kind and degree of "changes in conditions" would trigger "a full due diligence review." Would a sustained period of mediocre performance be sufficient? Or is substantial underperformance required? How about the resignation of a portfolio manager? A Securities and Exchange Commission investigation into a mutual fund family? A significant relative change in expense ratios as compared to peers, even as the fees for the plan remain static? Instead of leaving fiduciaries guessing as to

whether and how circumstances have changed, the current standard of care commands them to periodically review and monitor plan fees.

Second, the Ninth Circuit rule yields absurd outcomes. Consider the scenarios in Table 2:

Table 2

At selection	Current	Material Change?	Legal Claim?
1. Top decile in fees[16]	Top quartile in fees	Yes, substantially less expensive	New claim accrues because still high fees, even though better than before
2. Top decile in fees	Top decile in fees	No, remains equally terrible	No new claim accrues even though very high fees
3. Bottom decile in fees	Top decile in fees	Yes, substantially more expensive	New claim accrues because substantial increase in fees

[16] Top decile means the fund had among the top ten percent highest fees in its peer group, *i.e.*, it was more expensive than 90% of peer funds.

As these sample scenarios illustrate, with the Ninth Circuit's rule fiduciaries that retain the highest fee, expensive investment offerings would be protected from suit so long as the fees remained just as high (Scenario 1). If, however, there was a material reduction in fees, but the fee nevertheless remained high relative to market (Scenario 2), a new claim would accrue. The outcome of this rule is inconsistent with fiduciary obligations and common sense. Consider further that many of these excessive fee lawsuits involve conflicts of interest. Indeed, many such fee lawsuits involve funds and services offered by affiliates and subsidiaries of the plan sponsor. The fiduciaries who choose these affiliated offerings are almost always employees of the plan sponsor, sometimes in the very asset management unit that reaps the fees from the plan. These employees are appointed to serve as fiduciaries by senior executives or the board of directors—their bosses. And these employees generally steer billions of dollars in assets and millions in fees to their own employer. Such arrangements are fraught with conflicts. Under the Ninth Circuit's rule, however, so long as high fees remain unchanged, a conflicted and self-dealing investment decision can be forever enshrined in the plan. Such a rule will devastate standards of fiduciary care.

CONCLUSION

The judgment of the court of appeals should be reversed.

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AMICUS CURIAE BRIEF

No. 13-550

In the Supreme Court of the United States

GLENN TIBBLE, ET AL.,

Petitioners,

v.

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to the United States Court of Appeals
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BRIEF OF DRI—THE VOICE OF THE DEFENSE BAR AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF THE *AMICUS CURIAE* [1]

Amicus curiae DRI—The Voice of the Defense Bar is an international organization of more than 22,000 attorneys involved in the defense of civil litigation. DRI is committed to enhancing the skills, effectiveness, and professionalism of defense attorneys. Because of this commitment, DRI seeks to promote the role of defense attorneys, to address issues germane to defense attorneys and their clientele, and to improve the civil justice system. DRI has long participated in the ongoing effort to make the civil justice system fairer, more consistent, and more efficient.

To promote these objectives, DRI participates as *amicus curiae* in cases that raise issues important to its membership, clientele, and the judicial system. DRI members have extensive experience with the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1001, *et seq.*, and regularly defend against ERISA benefit claims. As a result, DRI seeks to ensure that benefit claims are enforced fairly, efficiently, and predictably.

Although Petitioners' claims here are for breach of fiduciary duty under ERISA §§ 502(a)(2) and (a)(3), DRI is concerned about the effect of the Court's decision on benefit claims under

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[1] Pursuant to Supreme Court Rule 37.6, DRI certifies that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from DRI, its members, and its counsel, made any monetary contribution toward the brief's preparation and submission. Counsel consented to the brief's filing in letters that are on file with the Clerk's office.

§ 502(a)(1)(B). To that end, DRI focuses on the distinction between fiduciary duty claims and benefit claims. DRI requests that the Court keep in mind that Petitioners' claims for breach of fiduciary duty are very different from claims for individual recovery of benefits under ERISA § 502(a)(1)(B). DRI strives to ensure that courts enforcing ERISA keep this distinction clear. In the event the Court considers Petitioners' "continuing violation" theory to toll accrual of Petitioners' fiduciary duty claims, the Court's decision should be crafted to avoid affecting benefit claims under ERISA § 502(a)(1)(B).

SUMMARY OF THE ARGUMENT

The Ninth Circuit's judgment should be affirmed because Petitioners' claims are untimely. *See* 29 U.S.C. § 1113(1). In reaching that conclusion, the Court should preserve ERISA's distinction between benefit claims and fiduciary duty claims. Because the question presented concerns only the timeliness of Petitioners' fiduciary duty claims, this Court's decision should be narrowly tailored to avoid benefit claims under § 502(a)(1)(B).

1. Benefit claims are fundamentally different from fiduciary duty claims. ERISA provides individual monetary relief for benefit claims under § 502(a)(1)(B), but not for fiduciary duty claims. *See* 29 U.S.C. § 1132(a). Moreover, ERISA's statute of repose does not apply to benefit claims; it applies only to fiduciary duty claims. *See* 29 U.S.C. § 1113(1). And because fiduciary duty claims are equitable in nature, the doctrine of laches serves as an independent bar to untimely claims.

2. The division between benefit claims and fiduciary duty claims should be maintained by courts enforcing ERISA. If the Court considers Petitioners' continuing violation theory for fiduciary duty claims, the Court's decision and analysis should not affect benefit claims under § 502(a)(1)(B). Every circuit court to consider the issue has rejected the continuing violation theory to toll benefit claims. These circuits correctly reason that a single decision that serves as the basis for a benefits claim cannot continue in time to toll the limitations period for filing suit. Petitioners' continuing violation theory therefore should not be exported to benefit claims under § 502(a)(1)(B).

ARGUMENT

I. Benefit Claims Are Fundamentally Different From Fiduciary Duty Claims.

Maintaining the division between benefit claims and fiduciary duty claims is essential to ensure ERISA's consistent and predictable enforcement. The Court's decision in this case should preserve this important distinction.

A. ERISA's Text Distinguishes Benefit Claims From Fiduciary Duty Claims.

ERISA's detailed civil enforcement scheme empowers certain aggrieved parties to bring a civil lawsuit to recover, among other things, for wrongful denial of benefits and breach of fiduciary duties. 29 U.S.C. § 1132(a). ERISA unambiguously sets forth different requirements for benefit claims and fiduciary duty claims.

First, ERISA provides different relief for benefit claims. A participant or beneficiary can bring suit under ERISA § 502(a)(1)(B) "to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan." 29 U.S.C. § 1132(a)(1)(B). Recovery for benefit claims can include individual monetary damages in the form of accrued benefits due. *Id.*

In contrast to the recovery available under § 502(a)(1)(B), ERISA does not provide an *individual* monetary remedy for fiduciary duty claims other than benefit denials. ERISA § 502(a)(2) allows an individual, in a representative capacity on behalf of the plan, to bring a claim for breach of fiduciary duty to recover "equitable or remedial relief as the court may deem appropriate." 29 U.S.C. § 1109; *see also LaRue v. Dewolff*, 552 U.S. 248, 256 (2008) (holding that "§ 502(a)(2) does not provide a remedy for individual injuries distinct from plan injuries"). And recovery under ERISA § 502(a)(3) is explicitly limited to equitable relief. 29 U.S.C. § 1132(a)(3); *Great-West Life & Ann. Ins. Co. v. Knudson*, 534 U.S. 204, 221 (2002) ("[Section] 502(a)(3), by its terms, only allows for *equitable* relief."). This section acts as a "safety net, offering appropriate equitable relief for injuries caused by violations that § 502 does not elsewhere adequately remedy." *Varity Corp. v. Howe*, 516 U.S. 489, 512 (1996).

Second, the limitations period applicable to benefit claims is different from fiduciary duty claims that are not based on benefit denials. ERISA does not include a statute of limitations for benefit claims

under § 502(a)(1)(B). Instead, federal courts look to and apply the most analogous state statute of limitations or plan-imposed limits. *Bd. of Regents v. Tomanio*, 446 U.S. 478, 483–85 (1980). Courts do not, however, "borrow" the accrual date from state law. The accrual date for a benefits claim is governed by federal law, which holds generally that an ERISA claim for denial of benefits accrues when the plan issues a "final denial," unless the plan specifies a different "reasonable" accrual date. *Heimeshoff v. Hartford Life & Acc. Ins. Co.*, 134 S. Ct. 604, 610 (2013). Circuit courts across the country categorically reject Petitioners' continuing violation theory in denial-of-benefit cases. *See infra*, Part II.

Unlike benefit claims, ERISA *does* contain an explicit provision within which other fiduciary duty claims may be brought against plan fiduciaries. If fiduciaries breach their duty, aggrieved participants have a limited period of time to challenge such breach:

> No action may be commenced under this subchapter with respect to a fiduciary's breach of any responsibility, duty, or obligation under this part, or with respect to a violation of this part, after the earlier of—
> (1) six years after
> (A) the date of the last action which constituted a part of the breach or violation, or
> (B) in the case of an omission the latest date on which the

> fiduciary could have cured the breach or violation, or
>
> (2) three years after the earliest date on which the plaintiff had actual knowledge of the breach or violation; except that in the case of fraud or concealment, such action may be commenced not later than six years after the date of discovery of such breach or violation.

29 U.S.C. § 1113. This provision is a statute of repose—an absolute barrier to liability three or six years after the alleged breach. *See CTS Corp. v. Waldburger*, 134 S. Ct. 2175, 2182 (2014) (holding that a similar provision under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 is a statute of repose); *see also* Resp. Br. at 44–47. Petitioners phrase the issue before the Court as one involving a statute of limitations, but Petitioners' claims are governed by ERISA's statute of repose. *See* 29 U.S.C. § 1113. For the reasons set forth in Respondents' Brief, Petitioners' failure at trial to prove subsequent and distinct breaches within the repose period is fatal to their claims. *See* Resp. Br. at 39–45.

Any question regarding the timeliness of Petitioners' claims should be answered by the doctrine of laches, which bars their claims entirely. *See* Restatement (Second) of Trusts § 219 (1959) ("The beneficiary cannot hold the trustee liable for a breach of trust if he fails to sue the trustee for the breach of trust for so long a time and under such circumstances that it would be inequitable to permit

him to hold the trustee liable."). The six-year statute of repose under § 1113 is merely an outside time limit for Petitioners' claims.

The Ninth Circuit's judgment should therefore be affirmed because Petitioners' claims for breach of fiduciary duty are barred by ERISA's statute of repose and the doctrine of laches.

B. Benefit Claims Cannot Be Disguised As Fiduciary Duty Claims.

The Court should preserve ERISA's purposeful division between benefit claims and other types of fiduciary duty claims and "respect the 'policy choices reflected in the inclusion of certain remedies and the exclusion of others.'" *Varity Corp.*, 516 U.S. at 515 (quoting *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 54 (1987)). Any attempt by plan participants or beneficiaries to camouflage benefit claims as fiduciary duty claims is fundamentally at odds with ERISA's statutory text. ERISA provides individual recovery for benefit claims under § 502(a)(1)(B) because adequate relief is available in the form of accrued benefits due. *See Varity Corp.*, 516 U.S. at 515 ("[W]here Congress elsewhere provided adequate relief for a beneficiary's injury, there will likely be no need for further equitable relief . . . ."). On the other hand, relief for other types of breach of fiduciary duties does not include the payment of benefits to individual participants. *See* 29 U.S.C. § 1132(a).

For these reasons, the Court should carefully limit its decision to the issues before it and should avoid affecting benefit claims under § 502(a)(1)(B). A decision that is narrowly tailored to Petitioners'

claims will help preserve ERISA's careful division between benefit claims and fiduciary duty claims.

II. The Continuing Violation Theory Is Inapplicable To Benefit Claims.

The Ninth Circuit correctly rejected Petitioners' continuing violation theory as applied to fiduciary duty claims. As Respondents rightly observe, Petitioners have abandoned the continuing violation theory they pursued in the lower courts. *See* Resp. Br. at 42–45. Nevertheless, DRI urges that the continuing violation theory is also untenable as applied to benefit claims under § 502(a)(1)(B). Every circuit court to address the issue has unequivocally rejected the argument that each monthly benefit payment received by a participant under an ERISA plan is an accrual event giving rise to a new statute of limitations for benefit claims. This Court's decision therefore should not affect the unanimous circuit court decisions that have foreclosed any attempt to circumvent the limitations applicable to benefit claims through a continuing violation theory.

Several circuits have also rejected the continuing violation theory for disability benefit claims under § 502(a)(1)(B). *See Riley v. Metro. Life Ins. Co.*, 744 F.3d 241, 246 (1st Cir. 2014) (reasoning that the continuing violation theory is "inapplicable where the alleged wrong is based on an alleged one-time miscalculation of ERISA benefits"); *Miller v. Fortis Benefits Ins. Co.*, 475 F.3d 516, 522 (3d Cir. 2007) (rejecting the theory "whereby a new cause of action would accrue upon each underpayment of benefits owed under the plan"). And other circuits have

rejected the continuing violation theory for § 502(a)(1)(B) claims for benefits due under a terminated welfare benefit plan, *see Adamson v. Armco, Inc.*, 44 F.3d 650, 653–54 (8th Cir. 1995), and an improper freeze of reimbursement benefits, *see Pisciotta v. Teledyne Indus., Inc.*, 91 F.3d 1326, 1332 (9th Cir. 1996) (per curiam).

The policies underlying ERISA support these decisions. ERISA's primary purpose is to promote predictability: ERISA seeks to "induc[e] employers to offer benefits by assuring a predictable set of liabilities." *Rush Prudential HMO, Inc. v. Moran*, 536 U.S. 355, 379 (2002). Allowing participants and beneficiaries to challenge denial of benefits under a continuing violation theory would undermine any semblance of predictability that ERISA purports to ensure. As these circuit decisions make abundantly clear, each monthly benefit payment (or lack thereof) does not give rise to a new statute of limitations for benefit claims under § 502(a)(1)(B). Because the availability of a continuing violation theory in a benefits case is not before the Court, and there is no dispute among the circuits that the continuing violation theory is unavailable for benefit claims, this Court's decision should be narrowly tailored to avoid that issue.

CONCLUSION

For these reasons, the Court should affirm the decision below as untimely under the doctrine of laches and ERISA's statute of repose, and carefully craft its decision not to affect benefit claims under ERISA § 502(a)(1)(B).

Respectfully submitted,

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AMICUS CURIAE BRIEF

No. 13-550

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Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE ESOP ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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BRIEF OF THE ESOP ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

INTEREST OF THE *AMICUS CURIAE*

The ESOP Association is a national 501(c)(6) trade association dedicated to supporting the creation and maintenance of employee stock ownership plans ("ESOPs"). ESOPs provide employees with an ownership stake in their employer on tax-preferred terms. According to the most recent Department of Labor analysis of the annual disclosures filed by sponsors of tax-qualified deferred compensation plans—known as Form 5500—more than 10.5 million U.S. employees work in a corporation that provides shared ownership through the ESOP model. As with all qualified employee retirement savings plans, ESOPs and their fiduciaries are governed by the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 *et seq.*

Since its creation in 1978, the Association has served the interests of companies with ESOPs, professionals with a commitment to ESOPs, and companies considering the implementation of an ESOP. The Association's primary members are 1600 corporations that sponsor ESOPs, 98% of which are privately held and 80% of which are "small" businesses with fewer than 500 employees. A major mission of the Association is to educate its members and their

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* Pursuant to Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part and that no person other than *amicus* and its counsel made a monetary contribution to its preparation or submission. The parties' letters consenting to the filing of this brief have been filed with the Clerk's office.

employee-owners—not just about the best practices for managing an enterprise with shared ownership but also about their duties and obligations under the laws and regulations that govern ESOPs. In 2014, over 11,000 people attended the Association's educational programs.

The Association participates as *amicus curiae* in cases where there is a potential for far reaching effects on ESOP administration, creation, or design. The Association's participation is warranted in this case because petitioners have proposed a standard of fiduciary conduct liable to affect all ERISA-governed plans, including ESOPs.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case is about everything or nothing at all.

In terms of the question presented, there is no dispute—Even if ERISA's six-year statute of repose bars a challenge to a fiduciary decision, it does not bar a claim that a fiduciary breached a duty to monitor that decision during the preceding six years.

But on a tangentially related question—the scope of the duty to monitor—the parties appear to take widely differing positions. Petitioners assert, essentially, that an investment either is prudent or not, and that the failure to detect imprudence is a breach of the duty to monitor. By implication, petitioners' position means that a fiduciary must undertake the same due-diligence analysis to monitor a decision as it does to make the decision in the first instance. Respondents disagree, contending that the duty to monitor is a distinct duty that was not, as a factual matter, breached in this case.

The ESOP Association takes no position on the parties' factual dispute, nor on whether the seeming irrelevance of the question presented warrants dismissal of the writ. Rather, this brief is submitted to underscore the serious deleterious consequences that would result from petitioners' position as to the scope of the duty to monitor.

Nothing in the text of ERISA identifies or delimits the duty to monitor. Rather, that duty is an application of the general duty of prudence. The duty of prudence, in turn, requires fiduciaries to act in a manner consistent with industry norms. So the scope of the duty to monitor is informed by what is done, as a factual matter, by ERISA fiduciaries. As a matter of practice, fiduciaries do not spend their days constantly reevaluating all of their past decisions. There are circumstances where reevaluation is warranted—such as when there has been a material change of circumstances—but, as common sense confirms, monitoring a decision looks very different from making the decision in the first place.

Adopting petitioners' rule would be costly, inefficient, and ultimately counterproductive. Requiring fiduciaries to engage in a tail-chasing exercise of continual reevaluation would increase monitoring costs exponentially. Fiduciaries fearing personal liability would lose the ability to focus on the matters of greatest importance to plan participants. Plan participants would ultimately pay the price, through added costs, decreased benefits, and less ambitious plan offerings.

Accordingly, if this Court reaches the parties' dispute regarding the scope of the duty to monitor, it should adopt respondents' position.

ARGUMENT

A. ERISA's Duty Of Prudence Does Not Require Fiduciaries To Use The Same Process For Making And Monitoring Decisions.

When a fiduciary makes a decision on behalf of an ERISA-governed plan, she is duty-bound to investigate options as warranted under the circumstances. Depending on the nature of the decision, the investigation may be extensive and time-consuming.

Once the decision is made, a reasonable fiduciary will trust her conclusions. Instead of starting the same process over again, she therefore turns her focus to other matters that serve the interests of plan participants.

These observations seem obvious, but they go to the heart of the parties' dispute. ERISA's fundamental requirement is for fiduciaries to act reasonably given the circumstances. No part of ERISA imposes on fiduciaries an absolute duty to second-guess by repeating due diligence and endlessly reconsidering decisions.

1. *ERISA's Duty Of Prudence Incorporates Industry Standards.*

In some circumstances, ERISA is aptly described as "enormously complex and detailed." *Mertens* v. *Hewitt Assocs.*, 508 U.S. 248, 262 (1993). But when it comes to fiduciary duties, ERISA speaks in general terms. The basic duties of an ERISA fiduciary (*i.e.*, anybody who exercises discretion over plan investments or plan administration, see ERISA § 3(16), 29 U.S.C. § 1002(16)) are to be loyal and prudent, to diversify assets (except in an ESOP, which is undiver-

sified by design), and to comply with plan documents (*id.* § 404(a), 29 U.S.C. § 1104(a)).

For the duty of prudence, which is at issue here, Congress did not provide an exhaustive list of requirements. Instead, Congress specified a general standard: A fiduciary must act as would "a prudent man acting in a like capacity and familiar with such matters." ERISA § 404(a)(1)(B), 29 U.S.C. § 1104(a)(1)(B). That relative standard is "profoundly protective of trustees who have followed common investment-industry standards." John H. Langbein, *The Contractarian Basis of the Law of Trusts*, 105 YALE L.J. 625, 657 (1995). After all, "[i]t would be both unreasonable and inexpedient to make a trustee responsible for not being more prudent than ordinary men of business are." George Gleason Bogert & George Taylor Bogert, *The Law of Trusts and Trustees* § 541, at 169 (rev. 2d ed. 1993) (quoting *Speight* v. *Gaunt*, [1883] 9 App. Cas. 1 (H.L.) 20 (Lord Blackburn) (appeal taken from Eng.)).

The duty of prudence is therefore best understood as a relative standard that incorporates industry practices. See *id.* at 167 ("[A] court does not examine the conduct of the trustee and determine in each case whether he acted reasonably, but rather compares his action with the external standard of the ordinarily prudent and skillful [person].") And, crucially, the duty is satisfied by the *procedure* a fiduciary employs, rather than the *result* she achieves. See U.S. Dep't of Labor, Meeting Your Fiduciary Responsibilities, http://www.dol.gov/ebsa/publications/fiduciaryresponsibility.html ("Prudence focuses on the *process* for making fiduciary decisions."); Restatement (Third) of Trusts § 77 cmt. a (2007) ("The

test of prudence is one of conduct not of performance.").

In the context of an investment selection, that means that a fiduciary should ask the questions that fiduciaries usually ask and make a decision based on the answers. According to the Secretary of Labor's regulations, a fiduciary satisfies the duty of prudence if she:

> (i) Has given appropriate consideration to those facts and circumstances that, given the scope of such fiduciary's investment duties, the fiduciary knows or should know are relevant to the particular investment or investment course of action involved, including the role the investment or investment course of action plays in that portion of the plan's investment portfolio with respect to which the fiduciary has investment duties; and
>
> (ii) Has acted accordingly.

29 C.F.R. § 2550.404a–1(b). That standard applies outside the context of investment decisions, as well: A fiduciary generally must identify and pursue a process that is appropriately tailored to the circumstances.

In the case of a consequential decision with implications for plan assets, following the appropriate decisional process can be a time-consuming ordeal. To cite a common example, suppose that a large company wanted to hire a new recordkeeper to administer its defined-contribution retirement plan. Such a project might consist of the following steps:

- *First*, hire a consultant (unless an existing employee has the necessary expertise).

- *Second*, establish a working group to survey industry trends.
- *Third*, identify the plan's recordkeeping requirements, and formulate a request for proposal tailored to those requirements.
- *Fourth*, identify candidates and solicit bids.
- *Fifth*, evaluate the bids by balancing competing considerations.
- *Sixth*, negotiate with bidders.
- *Seventh*, execute a contract.

See generally U.S. Dep't of Labor, Meeting Your Fiduciary Responsibilities, *supra*.

When all those steps are complete, the plan can transition to the new recordkeeper and develop and send required disclosures to plan participants. That process might well take a year or longer and require substantial investments of time and resources.

On a more individualized scale, suppose a single participant sought a determination as to eligibility for certain monthly plan benefits. A fiduciary, in those circumstances, would need to evaluate the facts, assess the plan's requirements, determine whether similar issues had been resolved in the past, and make a determination.

These decisions are expected to have lasting effects. Absent a change in circumstances, the fiduciary determining monthly benefits would not reinvent the wheel every month to determine who was entitled to benefits. And the fiduciary assessing recordkeepers would not undertake an exhaustive search process each month, because a recordkeeper is expected to serve out a contractual term.

2. Industry Standards Also Govern The Duty To Monitor.

Given the costs of a complete analysis, once a fiduciary completes the process to make a decision, she will rely on that decision unless and until there is a basis for further review.

To be sure, it is frequently *possible* for ERISA fiduciaries to undo past decisions. If a fiduciary issues a plan disclosure, she can undo that decision by issuing a new disclosure. Likewise, a denial of benefits could be reconsidered and reversed, or a vendor hired to perform a certain function could be fired and replaced.

But the fact that fiduciaries *could* revisit past decisions does not mean that other similarly situated individuals *would* undertake the sort of comprehensive review that led them to their original decision. After all, the list of past decisions that could theoretically be subject to ongoing review is ever-growing. If a fiduciary is not focused on the matters that merit reevaluation—generally speaking, matters as to which there is new information—forward progress is impossible.

There is no special provision in ERISA that requires fiduciaries to reevaluate past decisions. Instead, the same general standard applies—whether "a prudent man acting in a like capacity and familiar with such matters" would reevaluate the decision. Thus, as with other aspects of ERISA, the nature of ongoing review will be dictated by circumstances, as the Secretary of Labor recognized in a regulatory question-and-answer:

> Q: What are the ongoing responsibilities of a fiduciary who has appointed trustees or

> other fiduciaries with respect to these appointments?
>
> A: At reasonable intervals the performance of trustees and other fiduciaries should be reviewed by the appointing fiduciary in such manner as may be reasonably expected to ensure that their performance has been in compliance with the terms of the plan and statutory standards, and satisfies the needs of the plan. *No single procedure will be appropriate in all cases; the procedure adopted may vary in accordance with the nature of the plan and other facts and circumstances relevant to the choice of the procedure.*

29 C.F.R. § 2509.75–8, at FR–17 (emphasis added); see also Restatement (Third) of Trusts § 77 cmt. b ("The duty of *care* * * * involve[s] investigation appropriate to the particular action under consideration."); *id.* cmt. b(1) ("What constitutes due diligence, satisfying the duty of prudence, is inevitably affected by the nature of the transaction or activity and the market(s) involved."). Common sense dictates that the review process after a decision is made will look very different from a process in which the decision-maker begins with a blank slate.

By way of illustration, the initial decision to purchase a new car looks very different from the monitoring of an existing car purchase. A potential car buyer must identify her budget and the features that she requires and prefers. From those criteria, she can narrow the universe of potential cars to a smaller list of candidates worthy of a test drive. The test drive will inform her preference for final selection and she will begin to negotiate with a car dealership.

If she and the dealership can arrive upon a deal with satisfactory terms, she buys the car.

After the purchase is complete, the new car owner is expected to monitor her car. (Is it performing as expected? Has it been recalled? Does it need routine maintenance? Are there new technological advances that would warrant a trade-in?) Although a car owner theoretically gets to decide, on any given day, whether to drive her existing car or to purchase another one, no reasonable person looks at it that way. Making a change is costly—there are transaction costs and opportunity costs. Even though past decisions can be reopened, a car buyer reasonably anticipates that her car will have a certain useful life and that she can delay another exhaustive car search until 5, 7, or 10 years have elapsed.

ERISA fiduciaries operate in a similar fashion. An initial fiduciary decision will be accompanied by the activities described above—research, analysis, interviews, deliberations, and discussions. The fiduciary's decision is expected to have a certain useful life. In the interim, there will be monitoring. (Is performance as expected? Have market conditions changed? Have key employees left the vendor? Are there new innovations that warrant new attention?) Further investigation might be prompted by a change in circumstances. But in the ordinary course, it would be unreasonable and atypical for a plan fiduciary to conduct a complete analysis or to reassess her findings from a previous analysis.

Petitioners' brief suggests a fundamentally different approach to fiduciary obligations. They claim that this case involves a duty "to monitor and remove imprudent investments." Pet. Br. 29; accord *id.* at 25–26 (fiduciary must "monitor investments * * * to

determine whether existing investments are prudent"); *id.* at 27 (fiduciary breaches duty through "retention of an imprudent investment").

There is a duty to monitor, to be sure. But that duty is defined by (1) procedures (rather than outcomes); and (2) industry conventions (rather than absolute rules). ERISA thus does not focus on whether an *investment* is "prudent" or not. That question, after all, will depend on a host of considerations that are not specifically about the investment at all. (What other investment options are offered in the plan? What role does the investment serve in a hypothetical portfolio? Are the benefits and costs of the investment explained to plan participants? Would it be unnecessarily confusing to change the investment option? How much would it cost to transition? Cf. *Fifth Third Bancorp* v. *Dudenhoeffer*, 134 S. Ct. 2459, 2472 (2014) (prudence of fiduciary conduct depends on nature of alternative actions)).

Thus, to satisfy the duty to monitor, a fiduciary must determine what issues to evaluate and what approach is dictated by the analysis. It may well be true that, given infinite time and resources, certain refinements could be made. But that is irrelevant for purposes of ERISA's duty of prudence, which is designed to hold fiduciaries accountable for following industry norms. "The fiduciary duty of care * * * requires prudence, not prescience" (*DeBruyne* v. *Equitable Life Assurance Soc'y*, 920 F.2d 457, 465 (7th Cir. 1990) (internal quotation marks omitted)), so the relevant question is whether a similarly situated fiduciary following industry conventions would have undertaken the reevaluation in question. See also *In re Westfield Trust Co.*, 176 A. 101, 103 (N.J. 1935) ("However loudly it may now be said that people

should have foreseen, most men of that degree of prudence and caution that we call ordinary did not foresee. Wisdom after the event is not the test of responsibility.").

There is, thus, no abstract answer to whether a certain attribute of an investment—in this case, the expense ratio for the share class—should be reassessed at some particular frequency. Nothing in historical treatises answers that question, either. And that is because ERISA requires fiduciaries to consider how other reasonable persons in their position perform the same functions and to discharge their duties accordingly.

B. Expanding The Duty To Monitor Would Exact Unnecessary Costs On Fiduciaries And Plan Participants.

The rule envisioned by petitioners is worrisome. ERISA fiduciaries know how to follow industry customs. They speak with colleagues, attend conferences, read industry publications, and follow the analytical procedures dictated by the collective judgment of fellow professionals.

Petitioners' rule would effectively hold fiduciaries to a standard of prescience without any benefit of repose. Their approach suggests fiduciaries are expected continuously to scour their plans for "imprudence" at the risk of personal liability.

ERISA's statute of repose suggests a different approach. In most statutes, Congress includes a statute of limitations, which can be tolled pursuant to principles of equity. See *Lampf, Pleva, Lipkind, Prupis & Petigrow* v. *Gilbertson*, 501 U.S. 350, 363 (1991). But ERISA contains both a 3-year statute of limitations and a 6-year period of repose. See ERISA

§ 413, 29 U.S.C. § 1113. Absent fraud or concealment, the 6-year window on filing suit is absolute. *CTS Corp.* v. *Waldburger*, 134 S. Ct. 2175, 2182–83 (2014); cf. *Lampf, Pleva, Lipkind, Prupis & Petigrow*, 501 U.S. at 363. So given that claims to challenge an initial decision are extinguished after 6 years, there can be a claim outside that window only if a separate fiduciary duty was breached at a later date.

Petitioners suggest that the later-arising duty is a duty to detect "imprudence" within a plan, but discharging such a duty would be effectively impossible. Common sense dictates that, after a fiduciary completes due diligence and makes a decision, she should trust her judgment. If, instead, she has a duty to reconsider the decision she just made, it would increase her workload by orders of magnitude.

It is difficult enough for most companies to satisfy ERISA's labyrinthine regulations. See, *e.g.*, Scott Wooldridge, *DOL Cracks Down On Employer 401(k) Issues*, BENEFITSPRO, Mar. 31, 2014 ("Retirement plans, including 401(k) plans, are probably more regulated than anything in American economic life short of nuclear power plants.") (internal quotation marks omitted). To add mandatory reviews of fiduciary decisions—above and beyond the processes dictated by industry custom—would add to the workload of plan fiduciaries. The costs of plan fiduciaries are ultimately borne by plan participants (through increased expenses, reduced benefits, or, in the case of an ESOP, reduced corporate value). Moreover, adding inefficient review processes would increase expenses for third parties who do business with ERISA-governed plans. Those third parties would also be expected to pass along their burden to plan

participants (unless they dropped out of the market for ERISA services entirely).

These costs are difficult to quantify. But ERISA was designed to avoid becoming "so complex that administrative costs, or litigation expenses, unduly discourage employers from offering * * * benefit plans in the first place." *Varity Corp.* v. *Howe*, 516 U.S. 489, 497 (1996); see also *Conkright* v. *Frommert*, 559 U.S. 506, 517 (2010) (recognizing ERISA's "careful balanc[e]" between "'ensuring fair and prompt enforcement of rights'" of plan participants and "'the encouragement of the creation of such plans'") (quoting *Aetna Health Inc.* v. *Davila*, 542 U.S. 200, 215 (2004)). A rule that replaces industry norms with fiduciary-duty landmines dishonors that objective.

* * *

To resolve the question presented in this case, the Court need not resolve any disagreement. The parties agree that there is a duty to monitor and that, if a plaintiff alleges that the monitoring duty was breached, he has (at most) six years from the date of the monitoring failure to pursue a civil action.

To resolve the parties' actual dispute—concerning the scope of the duty to monitor—*amicus* urges this Court to reaffirm the basic standard articulated by Congress in its definition of the duty of prudence. An ERISA fiduciary is expected to act as would "a prudent man acting in a like capacity and familiar with such matters." ERISA § 404(a)(1)(B), 29 U.S.C. § 1104(a)(1)(B). In some circumstances, a fiduciary honoring that standard will reasonably review past decisions—or, to be more precise, certain aspects of past decisions. But because ERISA incorporates by reference the conduct of other fiduciaries,

there can be no one-size-fits-all standard for monitoring. Petitioners' insinuation is that there must have been a duty to monitor because cost savings may have been possible. But that sort of regulation-by-hindsight disserves the text of ERISA and its purpose: to balance the legitimate rights of plan participants to reasonable diligence with an incentive structure that encourages the voluntary provision of retirement and benefit plans.

If it reaches the question, this Court should therefore hold that the duty to monitor does not compel an investigation that is coextensive with the due diligence that accompanies an initial investigation. Rather, as with other applications of the duty of prudence, the duty to monitor is a function of circumstances and the appropriate exercises of judgment by professional fiduciaries.

CONCLUSION

Unless the petition is dismissed, the judgment of the court of appeals should be affirmed.

Respectfully submitted.

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AMICUS CURIAE BRIEF

No. 13-550

In The
Supreme Court of the United States

GLENN TIBBLE, ET AL.,

Petitioners,

v.

EDISON INTERNATIONAL, ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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INTEREST OF AMICI CURIAE

Amici curiae are legal scholars who write and teach about pension, employee benefits and trust law.[1] One of their primary areas of concern is retirement income security under defined contribution plans. The issues in this case are exceptionally important because they potentially affect the retirement income security of millions of plan participants. Unlike the situation in 1974, when ERISA was enacted, most private sector, non-unionized employers offer their employees only a defined contribution plan. These plans allow workers to make investment decisions among limited options made available by plan fiduciaries. Workers' retirement income security depends fundamentally on the performance of these investments.

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[1] The parties have filed with the Clerk of the Court blanket letters of consent to the filing of amicus briefs in support of any party. In fulfillment of the requirement of Rule 37.6, amici state that no counsel for either party has authored this brief in whole or in part, and that no person or entity, other than amici or their counsel, made a monetary contribution to the preparation or submission of this brief.

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Amici hope that their experience and expertise will assist the Court in its consideration of the important question this case presents.[2]

SUMMARY OF ARGUMENT

The Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1001 *et seq.*, requires a plan fiduciary to:

[2] This brief represents the opinions of the named professors and is not made on behalf of the named institutions.

> discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and . . . with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims.

ERISA § 404(a)(1)(A), (B), 29 U.S.C. § 1104(a)(1)(A), (B).

ERISA includes a limitations period which states, in relevant part:

> No action may be commenced under this subchapter with respect to a fiduciary's breach . . . after the earlier of—
>
> (1) six years after
>
> > (A) the date of the last action which constituted a part of the breach or violation, or
> >
> > (B) in the case of an omission the latest date on which the fiduciary could have cured the breach or violation. .

ERISA § 413, 29 U.S.C. § 1113.

This case concerns the application of those sections of ERISA to the selection and monitoring of the menu of investment choices offered to participants in a defined contribution plan.

The Court of Appeals for the Ninth Circuit held that, although fiduciaries breached their duty of prudence by offering higher-cost retail-class mutual funds to plan participants when identical lower-cost institutional-class mutual funds were available, the claim was barred by ERISA Section 413(1), 29 U.S.C. § 1113(1), because fiduciaries initially chose the higher-cost mutual funds as plan investments more than six years before the claim was filed. In reaching this decision, the Ninth Circuit appears to have confused two distinct requirements imposed by ERISA's duty of prudent investing: the duty to be prudent in the *selection* of plan investment options, and the duty thereafter prudently *to monitor* the selected investment options, to ensure that those options remain prudent choices. The court measured the limitations period from the date of the *initial* investment selection, rather than from the *last date* the imprudent investments could have been removed from the plan—the latter constituting the last date on which the fiduciary breach could have been corrected through diligent monitoring. Contrary to congressional intent, this interpretation of ERISA's six-year statute of limitations insulates fiduciaries from liability for imprudent behavior—namely, omitting to provide prudent monitoring—with regard to ongoing plan investment options, as long as that imprudent behavior occurs more than six years after the initial investment selection.

Petitioners' claims should not be barred by the statute of limitations. The law of trusts—upon which

ERISA is based—makes clear that fiduciaries have an *ongoing* duty to monitor investments, as frequently as is appropriate for the particular trust. Participants and beneficiaries are not precluded from bringing an action to challenge the prudence of an investment decision—either an act or an omission that breaches this ongoing duty—as long as the action is filed within the earlier of (1) six years after the date of the last action that constituted a breach or (2) in the event of an omission, within six years of the last date the fiduciary could have cured such a breach. That is, in the context of this case, (1) six years after the last decision to keep an imprudent investment in breach of the ongoing duty to monitor or (2) six years after the last date the fiduciary could have removed an imprudent investment.

ARGUMENT

I. The Claims Here

The Edison 401(k) Savings Plan (the "Plan") is a defined-contribution plan. The value of each participant's account at retirement depends on the extent of the participant's and employer's contributions, the investment options selected from the choices that are offered, the asset allocation, and the investment performance, minus costs.

The Edison Plan allows participants to choose from a variety of fund options selected by its Investment Committees. App. 13-14, 72-73, 78. The

Investment Committees meet quarterly to review plan investments, and at those meetings, they consider whether to keep, remove, replace, or add fund options. App. 74-75, 77, 94, 95 (stating that the subcommittees met to review "the funds for the Plan").

The Investment Committees selected retail class mutual fund options for six of approximately forty mutual funds made available to participants, even though identical institutional-class funds charged significantly lower fees. App. 68. As an institutional investor with approximately $3.8 billion in plan assets, the Plan was eligible to offer these lower-cost institutional funds to its plan participants, App. 13, 61 & n.24, 137-41; however, the Investment Committees chose not to do so. App. 68.

Petitioners allege that respondent plan fiduciaries breached their duty of prudence by selecting *and maintaining* higher-fee retail-class mutual funds as plan investment choices when identical lower-fee institutional-class funds were available. JA 76 (¶ 73).

After a bench trial, the district court held that respondents breached their duty of prudence by offering the higher-cost retail mutual funds. App. 68-69, 84-92, 128-42. However, the court limited its holding to three retail mutual funds, finding claims involving three other retail mutual funds, which the Committees initially selected before the beginning of the six-year limitation period, to be time barred. App. 128-42. The Ninth Circuit affirmed the district court's decision. App. 1-64.

Although the limitation period for claims based on the *initial* selection of an investment option begins with that selection, the fiduciaries have an *ongoing duty* to monitor investments and to remove any investment that is or has become imprudent.[3] A cause of action based on a failure to monitor accrues on the date(s) of that failure, not on the date of initial selection of the fund option.

No interpretation of ERISA or trust law justifies the decision of the Ninth Circuit. The effect of the decision is to say that there generally can be no claim for imprudence in retaining a fund option if the fund option was selected more than six years earlier, effectively immunizing fiduciaries from liability for every breach of the duty to monitor that occurs more than six years after an initial selection decision, and eviscerating a core part of the ongoing duty of prudence.

II. Background

As the Court recognized in *Varity Corp. v. Howe*, 516 U.S. 489 (1996), ERISA's "fiduciary duties draw much of their content from the common law of trusts,

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[3] Amici use the term "ongoing duty," rather than "continuous duty," for two reasons. First, because the duty requires periodic monitoring, not constant monitoring. Second, we wish to avoid any implication that Petitioners' claim is based on a continuing violation of the duty of prudent investing.

the law that governed most benefit plans before ERISA's enactment." *Id.* at 496 (citations omitted).

The Court continued: "We also recognize, however, that trust law does not tell the entire story. After all, ERISA's standards and procedural protections partly reflect a congressional determination that the common law of trusts did not offer completely satisfactory protection." *Id.* at 497 (citations omitted).

ERISA built upon and strengthened trust law provisions. Thus, for example, ERISA extended its trust-law-based fiduciary duties to all plan fiduciaries, including those who are not trustees.

When the Restatement (Third) of Trusts was being written in 1990, the reporters made changes to the Restatement to reflect the advances that ERISA had made. Restatement (Third) of Trusts at § 227 Reporter's Notes at 66-67 (1992). Under both ERISA and the Restatement, a fiduciary with investment discretion has a fiduciary duty to review plan investments to determine whether to sell off investments or to discontinue imprudent investment options.

Thus, it is appropriate to rely not only on the first and second editions of the Restatement, but also the third edition.

III. Fiduciaries Have Ongoing Duties That Are Part of the Duty of Prudence.

Trust law establishes that the *Tibble* fiduciaries have ongoing fiduciary duties, a breach of which violates the prudence rule. The principle that fiduciaries retain an ongoing duty to monitor investments for the entire period they act as fiduciaries has been a fixture of trust law through all three Restatements of Trust and is included in the Uniform Prudent Investor Act.

A. The Prudent Investor Rule Includes Managing and Monitoring Investments.

In *Tibble*, the Petitioners allege a failure to properly manage and monitor investment options.

The Restatement clarifies that "[t]he trustee has a duty to the beneficiaries to invest *and manage* the funds of the trust as a prudent investor would, in light of the purposes, terms, distribution requirements, and other circumstances of the trust." Restatement (Third) of Trusts § 90 (2007) [hereinafter Third Restatement] (emphasis added). This "prudent investor rule" has deep roots, transcends ERISA, and has been adopted in "nearly all jurisdictions." *Id.* cmt. a.

The Restatement (Second) of Trusts, which was current when ERISA was enacted, provides:

> Except as otherwise provided by the terms of the trust, if the trustee holds property which when acquired by him was a proper investment,

> but which thereafter becomes an investment which would not be a proper investment for the trustee to make, it becomes the duty of the trustee to the beneficiary to dispose of the property within a reasonable time.

Restatement (Second) of Trusts § 231 (1959) [hereinafter Second Restatement].

Similarly, under the Uniform Prudent Investor Act, promulgated in 1994 and now in force in almost all states, the duty of prudent investing applies both to "investing and managing trust assets. . . ." Nat'l Conference of Comm'rs on Uniform State Laws, Uniform Prudent Investor Act § 2(c) (1994). The official comment explains that "'[m]anaging' embraces monitoring, that is, the trustee's continuing responsibility for oversight of the suitability of investments already made as well as the trustee's decisions respecting new investments." *Id.* § 2 cmt.

B. ERISA Incorporated the Trust Origins of the Prudent Investor Rule.

In 1979, the Department of Labor promulgated regulations that expanded on the ERISA duty of prudence with respect to investment decisions. Final Regulation, Investment of Plan Assets Under the "Prudence" Rule, 44 Fed. Reg. 37,221 (June 26, 1979) (codified at 29 C.F.R. 2550.404a-1). The proposed regulations mentioned only the duty of prudence with respect to "*making* an investment decision." Preamble to Proposed Regulation, 43 Fed. Reg. 17,481 (Apr. 25,

1978). The Department of Labor received comments questioning "*whether, under the regulation as originally proposed, a fiduciary might be deemed to be immunized once he had given such consideration notwithstanding the nature of his subsequent acts.*" Preamble to Final Regulation, Investment of Plan Assets Under the "Prudence" Rule, 44 Fed. Reg. 37,221, 37,223 (June 26, 1979) (codified at 29 C.F.R. 2550.404a-1) (emphasis added).

In response, the Department of Labor revised the regulation to clarify that a fiduciary's duties do not end when the investment is made. 44 Fed. Reg. at 37,223 (stating "that the fiduciary's acts do not satisfy the 'prudence' rule solely because the fiduciary had given consideration to relevant facts and circumstances.").[4]

Thus, the Department of Labor has recognized that a fiduciary's duties are not static: trustees must monitor investment options to determine when they should add new options or discontinue current options.

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[4] The Department revised the proposed regulation to omit the reference to "making an investment decision" and broadened the language to clarify that the fiduciary duty continues during the entire "investment or investment course of action." 29 C.F.R. 2550.404a-1(b)(1) (Final Regulation); 44 Fed. Reg. at 37,223 (explaining revision to (b)(1)). The Department also clarified that the investment course of action includes "any series or program of investments or actions related to a fiduciary's performance of his investment duties." *Id.* at (c)(2). This would include the duty to monitor the investment option to ensure that it remains prudent.

29 C.F.R. 2550.404a-1(b)(2). In the absence of adequate monitoring and periodic reevaluation, a fiduciary cannot assess whether the investment remains prudent.[5]

C. Fiduciary Duties to Monitor, Review, and Manage Investments Are Necessarily Ongoing and Do Not Expire.

In carrying out the prudent investor rule, a fiduciary cannot simply make an investment decision and then ignore it. The fiduciary has an obligation to periodically revisit prior decisions, to determine whether they continue to serve the best interest of participants and beneficiaries.

A fiduciary's ongoing duties to monitor, review, and manage investments are separate from, and in addition to, the duty to make prudent investments in the first instance. These duties arise from the constantly changing market and investment conditions that affect the trust corpus and its value, and whether

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[5] *See, e.g.*, George Gleason Bogert, George Taylor Bogert & Amy Morris Hess, *The Law of Trusts and Trustees* § 744 (3d ed. 2000) ("As in the case of all powers and duties, a trustee who has a power of sale has an underlying obligation to use the care and skill of a reasonably prudent person who is managing property under similar conditions. In order to decide whether to use a discretionary power of sale, and when and how to exercise it, a trustee must become familiar with the property in question, the market and customs of the community with regard to such property, the objects of the trust, and the effect on the beneficiaries of use or lack of use of the power and of the exercise of the power in various ways.").

once-prudent decisions remain so. As summarized in the Third Restatement:

> Changes in a company's circumstances, adaptation to trust- and capital-market developments, fine-tuning, and the like may, of course, justify the selling and buying of properties as an aspect of a prudent plan of asset allocation and diversification (see Comment *g*, below). This is consistent with the trustee's *ongoing duty to monitor investments and to make portfolio adjustments if and as appropriate*, with attention to all relevant considerations, including tax consequences and other costs associated with such transactions.

Third Restatement § 90 cmt. e(1) (emphasis added). Further,

> [a]sset allocation decisions are a fundamental aspect of an investment strategy, and are a starting point in formulating a plan of diversification (as well as an expression of judgments concerning suitable risk-return objectives). . . These decisions are subject to *adjustment* from time to time as changes occur in the portfolio, in economic conditions or expectations, or in the needs or investment objectives of the trust.

Id. cmt. g (emphasis added).

The Restatement also provides that "[t]he trustee's duties apply not only in making investments *but also in monitoring and reviewing investments*, which

is to be done in a manner that is reasonable and appropriate to the particular investments, courses of action, and strategies involved." *Id.* cmt. b (emphasis added).

Bogert discusses this duty at length:

> If a trustee makes a lawful and prudent investment for his trust, or receives such an investment from the settlor or a predecessor trustee, he cannot assume that it will continue indefinitely to be a lawful and prudent investment. He cannot place it in his safety deposit box and ignore its status henceforth. *He has a duty to examine all his trust investments at reasonable intervals* in order to learn the condition of the obligor on bonds and mortgages, the condition of the property in which he holds a security interest, and the status of the corporations whose stock he holds.

George Gleason Bogert, *Handbook of the Law of Trusts* § 107 at 439-40 (3d ed. 1952) [hereinafter Bogert, *Trusts*] (emphasis added); *see also* Third Restatement § 92 ("The trustee has a duty, within a reasonable time after the creation of the trust, to review the contents of the trust estate and to make and implement decisions concerning the retention and disposition of original investments in order to conform to the requirements of §§ 90 and 91."); *id.* § 76 Reporter's Note to cmt. d (2007) ("a cursory review of the portfolio that skims over the predecessor's acts

and omissions will not suffice to insulate the successor fiduciary from liability").

After performing such a review, the trustee must then *decide* whether the investment continues to be prudent.[6] If the investment is imprudent, it must be sold:

> When an investment is at the beginning of the trust, or becomes later, an investment not permitted under the terms of the trust and the law of the state in question, the trustee has a duty to sell it as soon as he reasonably can and reinvest the proceeds.

Bogert, *Trusts* § 108 at 440. Moreover, "[t]his *same duty to convert or sell investments arises* when the trustee discovers that an investment originally legal, *whether made by him or by a predecessor in title*, has now become illegal or imprudent." *Id.* at 441 (emphasis added).[7]

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[6] The decision is made on the basis of all relevant facts and circumstances that exist on the date of the decision. The decision that an investment is imprudent does not depend on a finding that there have been changes, material or otherwise, since the investment was originally acquired.

[7] *See also* the Comment to Section 4 of the Uniform Prudent Investor Act: "Section 4, requiring the trustee to dispose of unsuitable assets within a reasonable time, is old law, codified in Restatement of Trusts 3d: Prudent Investor Rule § 229 (1992), lightly revising Restatement of Trusts 2d § 230 (1959). The duty extends as well to investments that were proper when purchased but subsequently become improper. Restatement of Trusts 2d § 231 (1959). The same standards apply to successor trustees, see

(Continued on following page)

Bogert states that the "so-called 'prudent investor statutes', which have been adopted in many states in recent years, apply that rule to the *retention* and sale of securities, as well as to their purchase." *Id.* at 442 (emphasis added).

Thus, *each* decision—to "make, retain, or sell an investment"—is subject to the prudent investor rule. Third Restatement § 90 cmt. b. To *retain* an investment is an act of trust management as much as a decision to make the investment.

IV. Both Acts and Omissions Are Actionable Breaches.

Both acts and omissions are actionable under ERISA and trust law. A decision to retain an asset (an act) is essentially the equivalent of an omission (failing to dispose of an asset that should be sold). Therefore, however these decisions are framed, they are potentially actionable as breaches of the fiduciary's duty of prudent management.

Although the statute of limitations for omissions in ERISA is expressed differently than for actions, *compare* ERISA § 413(1)(A) *with* (B), 29 U.S.C. § 1113(1), neither can bar a claim for any breaches of the *ongoing* trust duties, described here, that

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Restatement of Trusts 2d § 196 (1959)." Nat'l Conference of Comm'rs on Uniform State Laws, Uniform Prudent Investor Act § 4 cmt. (1994).

occurred within the limitations period. Nothing in trust law or ERISA allows the immunization of ongoing breaches, regardless of when—or at whose hands (a current or predecessor trustee)—a particular investment was selected.

The Ninth Circuit rejected the Petitioners' arguments because it mistakenly concluded that to accept those arguments would leave the Respondents liable indefinitely for their *original* decision to include the funds in the Plan's investment menu. That is incorrect. The Petitioners' position is not that the fiduciaries remain on the hook indefinitely for the initial imprudent decision. Rather, the liability is for the imprudence (breach of duty) that occurred each time the Committees met, discussed the Plan's investment options, and failed to remove the imprudent options. The Plan's Investment Committees met quarterly, and thus had numerous opportunities to remove the improper fund options. Had they done so, the period of limitations for their previous inaction would immediately have commenced to run.

V. Application of the Statute of Limitations as in *Tibble* Eviscerates the Substantive Duties That Bind Fiduciaries.

Because a fiduciary has an *ongoing* duty to be prudent, including in the management and monitoring of investments, the ERISA fiduciary duty to be prudent is not limited to the first six years an investment option is offered under the plan.

To hold otherwise would mean that plan participants who join a plan more than six years after an investment option is placed into a plan's investment menu would *never* be able to bring a breach of fiduciary duty claim regarding that investment option. Similarly, a fiduciary who is appointed to an investment committee more than six years after an investment option is placed into a plan would have no duty to monitor—or remove—such an investment option, no matter how imprudent.

CONCLUSION

Fiduciaries have the ongoing duty to monitor investment options throughout the lifetime of the investment, not just for the first six years. The statute of limitations in ERISA cannot be read to exonerate fiduciaries from liability for breaches of that duty. Such a conclusion would contravene the fundamental purpose of ERISA—to provide retirement security to workers.

For the above stated reasons, the judgment of the Ninth Circuit Court of Appeals should be reversed.

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AMICUS CURIAE BRIEF

No. 13-550

IN THE

Supreme Court of the United States

GLENN TIBBLE, ET AL.,

Petitioners,

v.

EDISON INTERNATIONAL, ET AL.,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

BRIEF FOR THE NATIONAL ASSOCIATION OF MANUFACTURERS, THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, THE ERISA INDUSTRY COMMITTEE, THE AMERICAN BENEFITS COUNCIL, AND THE BUSINESS ROUNDTABLE AS *AMICI CURIAE* SUPPORTING RESPONDENTS

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INTEREST OF *AMICI CURIAE*[1]

The National Association of Manufacturers is the largest manufacturing association in the United States, representing small and large manufacturers in every industrial sector and in all 50 states. Manufacturing employs over twelve million men and women, contributes roughly $2.1 trillion to the U.S. economy annually, has the largest economic impact of any major sector and accounts for two-thirds of private-sector research and development. Its mission is to enhance the competitiveness of manufacturers and improve American living standards by shaping a legislative and regulatory environment conducive to U.S. economic growth.

The Chamber of Commerce of the United States of America is the world's largest business federation. It directly represents 300,000 members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of the nation's business community in matters before Congress, the Executive Branch, and the courts.

The ERISA Industry Committee is a nonprofit organization representing America's largest private employers sponsoring pension, savings, healthcare,

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[1] Counsel for each party consented to the filing of this brief and correspondence reflecting this consent is on file with the Clerk of the Court. No counsel for any party authored this brief in whole or in part, and no person or entity other than *amici*, their members, or their counsel made a monetary contribution to its preparation or submission. *See* Sup. Ct. R. 37.6.

disability, and other employee benefit plans that provide benefits to millions of active workers, retired persons, and their families nationwide. ERIC frequently participates as amicus curiae in cases that have the potential for far-reaching effects on employee benefit design or administration.

The American Benefits Council is a broad-based nonprofit organization dedicated to protecting and fostering privately sponsored employee benefit plans. The Council's approximately 400 members are primarily large U.S. employers that provide employee benefits to active and retired workers. The Council's membership also includes organizations that provide services to employers of all sizes regarding their employee benefit programs. Collectively, the Council's members either directly sponsor or provide services to retirement and health plans covering more than 100 million Americans.

The Business Roundtable is an association of chief executive officers of leading U.S. companies with $7.2 trillion in annual revenues and nearly sixteen million employees. BRT member companies comprise more than a quarter of the total value of the U.S. stock market and invest $190 billion annually in research and development–equal to seventy percent of U.S. private R&D spending. BRT companies pay more than $230 billion in dividends to shareholders and generate more than $470 billion in sales for small- and medium-sized businesses annually. United and amplifying the diverse business perspectives and voices of America's top CEOs, BRT promotes policies to improve U.S. competitiveness, strengthen the economy, and spur job creation.

NAM, the Chamber, ERIC, the Council, and the BRT frequently participate as *amici curiae* in cases with the potential to significantly affect the design and administration of employee benefit plans. Many of these organizations' members offer their employees the opportunity to participate in defined-contribution plans similar to the one at issue here. Both the companies that sponsor those plans and the fiduciaries who administer them have significant interests in the theories of legal liability that may be enforced against them as well as the length of time they may be exposed to potential litigation. *Amici* respectfully submit that overturning the Ninth Circuit's judgment could have a detrimental impact on employer-sponsored retirement plans.

SUMMARY OF THE ARGUMENT

Section 413(1) of the Employee Retirement Income Security Act of 1974 (ERISA) provides that "[n]o action may be commenced . . . with respect to a fiduciary's breach of any responsibility . . . six years after (A) the date of the last action which constituted a part of the breach . . . or (B) in the case of an omission the latest date on which the fiduciary could have cured the breach or violation . . . ." 29 U.S.C. § 1113(1).

Petitioners, current and former participants in an ERISA-covered 401(k) plan sponsored by respondent Edison International, brought suit in 2007 to challenge (as pertinent here) the prudence of three investment options that had been selected for inclusion in the plan in 1999. These investment options were retail-class shares of mutual funds; petitioners' claim of imprudence is based on the availability of

institutional-class shares in the same funds that offered lower fees. Both courts below concluded that petitioners' challenge to those three investment options was barred by ERISA's timely filing provision, as suit was brought more than six years after the fiduciary act complained of (*i.e.*, the selection of the retail-class mutual funds) had been completed. Pet. App. 16-19; 178-81.

In this Court, petitioners argue that, even in the absence of any material change in circumstances, the plan fiduciaries' failure to remove those three retail-class options from the plan and replace them with available institutional-class shares in the same mutual funds was an actionable breach of fiduciary duty that is not time-barred because it occurred continuously during the six years prior to the filing of the complaint. Pet. Br. 2. This type of "continuing violation" theory would subject fiduciaries to perpetual exposure to litigation and potential liability for investment selection and other acts completed long before suit was actually filed. If accepted by this Court, it would upset the careful balance between protecting beneficiaries and preserving benefit plans that is central to ERISA by transforming Section 413(1) from a time bar into a mere limitation on damages.

I. One of ERISA's primary goals is to reduce the regulatory burden and the volume of potential litigation faced by ERISA plan sponsors and fiduciaries in order to encourage employers to offer employee benefit plans. ERISA Section 413(1) furthers that goal by cutting off liability for breaches of fiduciary duties six years after they occur, thereby providing plan fiduciaries the repose and finality they require to effectively administer employee benefit plans. Al-

though this cutoff, like all time bars, might prevent some plaintiffs from bringing meritorious claims, it also bars unmeritorious claims and saves the expense of litigating all untimely claims.

Petitioners attempt to avoid the clear import of Section 413(1) and subvert Congress's considered judgment that six years is sufficient by advancing an interpretation of a fiduciary's duty to monitor that would render fiduciaries perpetually liable for allegedly imprudent decisions made more than six years before. This Court should reject this effort to rewrite Section 413(1), which would effectively transform it from a statute of repose into a rolling limitation on damages, and instead preserve the careful balance struck by Congress when it crafted ERISA.

II. Petitioners and the Department of Labor conflate two different aspects of fiduciary decision-making—the initial selection of investment options and the ongoing monitoring of investment performance—in an unprecedented effort to encumber plan fiduciaries with a constant duty to reevaluate the entirety of a portfolio on some unstated periodic basis. Petitioners' (and the DOL's) argument hinges on this conflation. Yet, while both the selection duty and the monitoring duty are well-established and rigorous, they are *not* the same and there is no support in the law to say otherwise.

Petitioners' theory appears nowhere in the statute and is not supported by the authorities they rely on. Rather, petitioners cobble together pieces of various treatises and rely primarily on an 1891 decision of the New York Surrogate's Court to support their view that a fiduciary's duty to monitor investment

performance extends to factors that are unchanged and unchanging—and perhaps may only be evident when the process for selecting an investment is recreated in its entirety, as with the instant claims. In so arguing, petitioners gloss over the fact that neither this Court nor any federal appellate court has ever accepted this approach to fiduciary duties under ERISA in the over forty years since that statute was passed. They also ignore the fact that ERISA plan participants are protected by numerous ongoing fiduciary duties—which were primarily developed via rulemaking or established by statute, rather than ad hoc during litigation—as well as by their ability to move their investments to other funds. The duty proposed by petitioners is both unprecedented and unnecessary to protect ERISA participants, and should be rejected by this Court.

III. In supporting petitioners' position here, the DOL is attempting to engage in regulation via amicus brief. By joining in petitioners' broadside attack on retail-class mutual fund shares, the DOL is effectively saying that these are imprudent options for 401(k) plans, without having made any regulatory pronouncement to that effect. An amicus brief is not the appropriate vehicle to establish standards for a hitherto unknown theory of fiduciary duty that could have such a sweeping effect. Rather, that effort, if appropriate at all, is properly the topic of notice-and-comment rulemaking, where industry participants and employers could provide guidance as to precisely what the contours of any new duties should be. This Court should therefore not afford any deference to the DOL's position.

The judgment of the Ninth Circuit holding that petitioners' challenge to the three mutual funds at issue is time-barred by Section 413(1) should be affirmed.

ARGUMENT

I. ERISA SECTION 413(1) REQUIRES BREACH OF FIDUCIARY DUTY CLAIMS TO BE BROUGHT WITHIN SIX YEARS

Congress's aim in enacting ERISA was to protect the interests of participants in employee benefit plans and their beneficiaries, 29 U.S.C. § 1001(b), while simultaneously recognizing that employers were not required to offer these benefits in the first instance, and therefore should not be discouraged from doing so by the imposition of an unduly burdensome regulatory regime. *See Conkright v. Frommert*, 559 U.S. 506, 517 (2010). Consequently, this Court has acknowledged that the enforcement of ERISA must reflect a "'careful balancing' between ensuring fair and prompt enforcement of rights under a plan and the encouragement of the creation of [employee benefit] plans" in the first instance. *Aetna Health Inc. v. Davila*, 542 U.S. 200, 215 (2004) (quoting *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 54 (1987)).

As part of this "careful balancing," ERISA is designed to streamline the regulatory landscape and cut down on the costs, including litigation expenses, faced by plan sponsors and fiduciaries. *Conkright*, 559 U.S. at 517. Accordingly, when interpreting ERISA, courts should "take account of competing congressional purposes, such as Congress' desire to offer employees enhanced protection for their benefits [and] its desire not to create a system that is so

complex that administrative costs, or litigation expenses, unduly discourage employers from offering welfare benefit plans in the first place." *Varity Corp. v. Howe*, 516 U.S. 489, 497 (1996). In *Rush Prudential HMO, Inc. v. Moran*, 536 U.S. 355 (2002), this Court described "ERISA's policy of inducing employers to offer benefits by assuring a predictable set of liabilities, under uniform standards of primary conduct and a uniform regime of ultimate remedial orders and awards when a violation has occurred." *Id.* at 379.

Section 413(1) is one of the ways that ERISA limits the exposure (and thus the costs) of plan sponsors and fiduciaries, which Congress believed would encourage employers to offer benefit programs, thus benefitting employees. It does so by cutting off liability for breaches of fiduciary duties six years after the "last action which constituted a part of the breach or violation" or "in the case of an omission the latest date on which the fiduciary could have cured the breach or violation." 29 U.S.C. § 1113(1); *see Radford v. Gen. Dynamics Corp.*, 151 F.3d 396, 400 (5th Cir. 1998) (per curiam); *Larson v. Northrop Corp.*, 21 F.3d 1164, 1172 (D.C. Cir. 1994). Section 413(1) serves the "basic policies of all limitations provisions: repose, elimination of stale claims, and certainty about a plaintiff's opportunity for recovery and a defendant's potential liabilities" (*Rotella v. Wood*, 528 U.S. 549, 555 (2000)), which are particularly important in the context of ERISA litigation.

By cutting off liability after a set date, ERISA Section 413(1) reduces the uncertainties faced by plan fiduciaries, plan sponsors, and plan participants. *See Ranke v. Sanofi-Synthelabo Inc.*, 436 F.3d

197, 205 (3d Cir. 2006); *Radford*, 151 F.3d at 400; *Larson*, 21 F.3d at 1172. Section 413(1), like all statutes of limitation or repose, is "intended to 'promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared.'" *Gabelli v. SEC*, 133 S. Ct. 1216, 1221 (2013) (quoting *Order of R.R. Telegraphers v. Ry. Express Agency*, 321 U.S. 342, 348-49 (1944)). Like other time-bar provisions, Section 413(1) provides "security and stability" for both ERISA fiduciaries and beneficiaries by "stimulat[ing] activity and punish[ing] negligence" of potential plaintiffs. *Wood v. Carpenter*, 101 U.S. 135, 139 (1897). "The theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them." *Order of R.R. Telegraphers*, 321 U.S. at 349.

Section 413(1) unequivocally expresses Congress's clear intent to provide plan fiduciaries with some measure of repose and finality with respect to the decisions they make, including the selection of investment options to include in 401(k) plans. Section 413(1) reflects Congress's best judgment "on the proper balance between the policies of repose and the substantive policies of enforcement" that should apply to claims for breaches of fiduciary duties under ERISA. *See Wilson v. Garcia*, 471 U.S. 261, 271 (1985).

Section 413(1) is an unequivocal legislative determination that finality is warranted six years after a fiduciary decision had been made. The very nature

of a period of limitations or repose is that some claims, even if meritorious, might be cut off or prevented in favor of allowing a decision-maker to achieve finality based on previous decisions, such as the selection of investment plan options. It also deters plaintiffs from advancing non-meritorious or even frivolous claims in the hope of securing a settlement, thereby saving litigation expenses that could be put to better use providing benefits to participants.

Despite their assertions to the contrary, petitioners attempt to either ignore or undermine the clear Congressional intent embodied in Section 413(1) to bar stale claims of fiduciary breach by asserting a continuing violation theory which was rejected by the courts below and is inconsistent with ERISA in general. To adopt petitioners' unprecedented theory of fiduciary responsibility in the circumstances reflected in this case would undermine the benefits to both fiduciaries and participants that Congress saw in that finality. It would create perpetual exposure to litigation for decisions made perhaps decades earlier by other fiduciaries.

A. Section 413(1) Is A Traditional Time Bar

Petitioners and their *amici* frame their argument as one about the duties of ERISA fiduciaries, effectively arguing that ERISA fiduciaries should be perpetually exposed to litigation regarding long-past decisions. This is, however, plainly at odds with the clear terms of Section 413(1), which operates as a statute of repose: It extinguishes the underlying liability of a defendant as to potential claims arising

from a particular action and is not subject to equitable tolling. *See CTS Corp. v. Waldburger*, 134 S. Ct. 2175, 2182-83 (2014); *United States v. Beggerly*, 524 U.S. 38, 48 (1998). A statute of repose begins to run "from the date of the last culpable act or omission of the defendant" and cuts off liability "even if this period ends before the plaintiff has suffered a resulting injury," as Section 413(1) does. *CTS*, 134 S. Ct. at 2182-83 (internal quotation marks omitted).

That Section 413(1) is a statute of repose is further demonstrated by the inclusion of Section 413(2), which cuts off liability for breaches of fiduciary duties three years "after the earliest date on which the plaintiff had actual knowledge of the breach or violation" if that date precedes the six-year cutoff in Section 413(1). 29 U.S.C. § 1113(2). This three- and six-year structure is "fundamentally inconsistent" with equitable tolling—a hallmark of a statute of repose—because the inclusion of the six-year period "can have no significance in this context other than to impose an outside limit." *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 363 (1991) (internal quotation marks and citation omitted). Section 413 is therefore designed to provide ERISA fiduciaries an even greater measure of finality than would a statute of limitations.[2]

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[2] Section 413(1) is better read as a statute of repose, rather than a traditional statute of limitations. The key difference is that a statute of limitation may be subject to equitable tolling, while a statute of repose is not. Since petitioners do not advance any arguments that the six-year time bar in Section 413(1) should be equitably tolled, whether Section 413(1) is a statute of repose or a statute of limitations would not have a

Numerous other statutes of repose operate in a similar fashion, extinguishing the underlying liability for the challenged actions after the passage of a specified period of time. *See, e.g.*, *Beach v. Ocwen Fed. Bank*, 523 U.S. 410, 417 (1998) (Truth In Lending Act); *Lampf*, 501 U.S. at 363 (Sections 11 and 12 of the Securities Act). In those contexts, as under ERISA, repose serves to reduce litigation, thereby reducing uncertainty and allowing decision-makers to achieve finality with regard to their actions.

ERISA Section 413(1) reduces plan litigation costs by extinguishing potential fiduciary liability after six years from the last act that formed part of the alleged breach, which ultimately helps to preserve value for the plan participants and their beneficiaries. In this case, the increased litigation costs to ERISA plans outweigh any benefits to plan participants that might flow from reading Section 413(1) as merely a limitation of the period for which damages may be recovered, as petitioners and their *amici* do. *Cf. Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 115 (1989) (weighing "the threat of increased litigation" against the value of the proposed standard).

To skirt the clear terms of ERISA's six-year time bar, petitioners and their *amici* contend they are not challenging the initial selection of the funds as imprudent, but rather their ongoing inclusion in the plan as evidence of imprudent monitoring of the plan. Pet. Br. 39-41. Petitioners' assertion that the failure to remove the challenged investment options

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different result on petitioners' claims at issue. In either case, those claims would be time-barred.

is a new breach of duty that has caused them harm is nothing more than a disingenuous effort to avoid the preclusive effect of ERISA Section 413(1). What petitioners are truly complaining about is the alleged current injury resulting from an act—the initial selection of the challenged mutual funds—that was completed more than six years before they filed suit.

Although petitioners and the DOL assert they are not advancing a "continuing violation" theory, that is the real import of their argument. Petitioners would convert Section 413(1) from a statute of repose into a mere rolling limitation on damages by allowing an ERISA plaintiff to recover six years of damages for an allegedly imprudent fiduciary act that occurred more than six years prior to suit. This is inconsistent with the structure of ERISA Section 413(1), which clearly bars liability based on conduct that was completed more than six years earlier, and does not allow for the "separate accrual" of repeated causes of action arising out of that single completed act. *Cf. Petrella v. Metro-Goldwyn-Mayer, Inc.*, 134 S. Ct. 1962, 1969 (2014).

Not only would this theory of perpetual exposure to litigation and liability be inconsistent with the text of Section 413(1), it would contradict the policies underlying ERISA, by imposing the distractions on fiduciaries that any litigation causes, compounded by the difficulties of litigating stale claims. It would also burden plan fiduciaries with new and continuing duties that would increase the likelihood of litigation at all times. Such an uncapped structure undermines ERISA's goals of containing fiduciary liability (remembering that fiduciaries are personally liable for breaches) and curtailing litigation expenses. *See*

Varity, 516 U.S. at 497. These increased costs might well discourage plan sponsors—who will often indemnify fiduciaries for litigation expenses or purchase insurance on their behalf—from offering benefits plans, result in diminished plan benefits, or discourage qualified individuals from serving as ERISA fiduciaries at all.

B. Section 413(1) Bars The Claims At Issue

Contrary to petitioners' and the DOL's assertions, reading Section 413(1) to operate as it is written to cut off liability after six years from the selection of the investment option is fully consistent with the balance Congress struck between making fiduciaries accountable to participants for their decisions and putting matters to rest. *See Lampf*, 501 U.S. at 360-61 (rejecting the SEC's argument that adopting a three-year period of repose would frustrate the policies underlying § 10(b)).

Ignoring or undermining the time bar of Section 413(1) is also unnecessary, as ERISA mandates the protection of plan participants and their beneficiaries by way of its reticulated design. ERISA sets forth numerous ongoing fiduciary duties, including the obligations, *inter alia*, to review financial audits, *see* 29 U.S.C. § 1023; to monitor the performance of service providers, *see* 29 C.F.R. § 2509.75-8; to provide plan participants with adequate information to inform their plan selections, *see* 29 U.S.C. § 1104(c); and to ensure ongoing compliance with plan documents and the ERISA statute itself, *see id.* § 1104(a)(1)(D). In fact, the regulations set forth by the DOL that do describe a fiduciary's duty to monitor the prudence of

plan investments, and which have been in place for nearly thirty-five years, do not require repeated full reassessments of all of the investment options in light of what other options may be available. *See* 29 C.F.R. § 2550.404a-1.

In pressing for an interpretation of an ERISA fiduciary's ongoing duty to monitor that would require continuous reassessment, petitioners and the DOL argue that enforcing Section 413(1) as written could harm ERISA plan participants by preventing them from challenging the inclusion of an investment option in a plan if it has been part of the plan for six years or longer "even if the continued imprudence of the investment is obvious." DOL Br. 31. This argument is flawed on multiple levels.

If an included investment option were "obviously" imprudent, it is highly unlikely that it would escape challenge within six years of its inclusion, just as it is unlikely that other egregious breaches of fiduciary duties would escape challenge within that period. Additionally, purported breaches that do escape challenge within six years will likely do so either because they have been concealed or the conduct involved has been misrepresented to participants, and will thus fall within Section 413's separate provision for when a fiduciary breach has been fraudulently concealed. 29 U.S.C. § 1113(2); *see In re Unisys Corp. Retiree Med. Benefit "ERISA" Litig.*, 242 F.3d 497, 502 (3d Cir. 2001) (holding fraud or concealment exception applies where fiduciary took affirmative steps to hide breach).

Indeed, the limited exception for cases of "fraud or concealment" in Section 413(2), 29 U.S.C.

§ 1113(2), strongly suggests that the statute of repose should be fully enforced in all other circumstances. *See Larson*, 21 F.3d at 1172 ("the special provision Congress made elsewhere in § 1113 for fraud or concealment . . . provides amelioration in the worst cases while, at the same time, indicating that Congress meant to toll the statute only in instances of fraud or concealment"). Congress's inclusion of an exception in the statute should preclude the Court from reading another one into it. *Cf. Gabelli*, 133 S. Ct. at 1223-24 (declining to read an exception into a statute of limitations where Congress has not expressly provided one). The Court should not depart from the clear text of Section 413(1) by embracing what is—if not the discredited "continuing violation" theory—the first cousin to that approach.

There is no compelling reason to override Congress's clear intent and decline to enforce Section 413(1)'s time bar in this case. All repose and limitations periods operate to cut off stale claims, even potentially meritorious ones. But time bars also deter stale unmeritorious claims, thus saving litigation expenses. Petitioners offer no reason that would warrant "accept[ing] a lesser degree of responsibility on the part of" an ERISA plaintiff than from plaintiffs in other contexts where time-barring provisions have been applied to stale claims. *Rotella*, 528 U.S. at 556 (finding RICO plaintiffs are "responsible for determining within the limitations period then running" whether they have valid claims).

Although petitioners contend that a great injustice would take place if a participant who joins an ERISA plan could not challenge the inclusion of an imprudent investment option chosen over six years

before even if she filed suit on the day she joined the plan, *see* Pet. Br. 50, they overlook the simple point that a participant may choose not to invest at all in a plan option that has been in the plan for six years.

Petitioners' theory of perpetual exposure to litigation and potential liability is not only at odds with the policy of ERISA, but of statutes of repose and limitation in general, which recognize that "[i]n compelling circumstances, even wrongdoers are entitled to assume that their sins may be forgotten." *Wilson*, 471 U.S. at 271. In this instance, the value of finality outweighs the risk that certain ERISA participants and beneficiaries will not have the opportunity to challenge some allegedly imprudent decisions made more than six years before. This is particularly true where, as here, participants were already protected by a full complement of ongoing fiduciary duties, were able to move their investments to other options if they chose to, and could have challenged the inclusion of imprudent investment options if a change in circumstances had occurred (which petitioners here tried to establish, but which the district court determined after trial that they had failed to prove).

II. PETITIONERS' NEW THEORY OF LIABILITY WOULD MAKE SECTION 413(1) MEANINGLESS

Petitioners attempt to end-run the clear terms and policies of Section 413(1) by inventing a new theory of fiduciary responsibility under ERISA that is neither supported by statute or precedent nor necessary to protect beneficiaries. Petitioners and their *amici* purport to ground their arguments in the common law of trusts, which they argue expands the

monitoring duties currently performed by ERISA fiduciaries to include not only monitoring investment performance, but constantly reevaluating the entire portfolio, even if circumstances remain unchanged since the portfolio was assembled. *See* DOL Br. 29, 32-33. To that end, they cite snippets of trust treatises that are taken out of context and heavily rely on an 1891 case from the New York Surrogate's Court in an attempt to gloss over the fact that there is no federal appellate precedent to support their position.

Their arguments in favor of recognizing this never-before-known-under-ERISA duty fail because: (A) petitioners and their *amici* conflate the ERISA fiduciary's duty to monitor with his duties upon selection of an investment in an attempt to import tasks performed at selection into this duty to monitor; (B) there is no such duty that would extend to the constant reevaluation of a portfolio of investments; and (C) adoption of petitioners' position could result in a drastic increase in fiduciary liability for decisions previously considered to be final, defeating the purpose of Section 413(1).

A. Petitioners' Theory Improperly Conflates The Separate Duties Of Selection And Monitoring

Central to the position taken by petitioners and the DOL is a misunderstanding of an ERISA fiduciary's duties at various times during the life of a plan. Specifically, petitioners and the DOL conflate a fiduciary's duty in selecting investments with its ongoing duty to monitor the performance of those investments, importing the tasks performed at selection

into the duty to monitor in order to make their claims plausible. Without merging those two distinct responsibilities, petitioners and the DOL would not be able to support their position that Section 413(1)(A) really operates as a damages limitation, not a statute of repose, or even of limitation.

But neither this Court nor any federal appellate court has ever accepted this approach to fiduciary duties under ERISA. And for good reason: the selection duty and the monitoring duty are not the same. Yet, petitioners' (and the DOL's) argument principally hinges on erroneously conflating these different fiduciary functions.[3]

The processes undertaken by an ERISA fiduciary during the separate selection and monitoring phases of managing a portfolio of investments are distinct. An ERISA fiduciary's obligations under the prudent man standard vary depending on the "circumstances then prevailing" and according to the specific context of "an enterprise of a like character and with like aims." 29 U.S.C. § 1104(a)(1)(B). Therefore, the reasonableness of a fiduciary's actions is judged in the context of, and varies depending upon, the context of the decision being made and the goals being addressed. The question is not whether ERISA fiduci-

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[3] The fact that petitioners cannot support their position without conflating these two duties demonstrates why the writ should be dismissed as improvidently granted. *See* Resp. Br. 26-29. Given that petitioners were unable to prove in the district court that respondents violated their duty to monitor and do not challenge that finding in this Court, there is no dispute left for this Court to resolve, particularly not one within the scope of the limited question on which certiorari was granted. *Id.*

aries have a duty to monitor, but whether that duty reasonably includes a duty to remove an investment option when nothing has changed to indicate that its initial selection was imprudent and when participants have chosen to invest in that option, having received full and accurate disclosures as to the option's characteristics. Despite petitioners' and their *amici*'s arguments to the contrary, that question can only be answered in the negative.

The prudence of the selection process is judged in the context of the industry standards existing at the time of the action. *See Laborers Nat'l Pension Fund v. N. Trust Quantitative Advisors, Inc.*, 173 F.3d 313, 322 (5th Cir. 1999). When a fund is added to a plan menu, an ERISA fiduciary will consult various sources of data to determine the prudence of offering that fund option, including comparisons of different fund options in the asset class along various performance metrics. Fiduciaries frequently engage outside consultants to assist in the selection of funds. At this stage, a fiduciary's goal is to put together a portfolio of investment options that is sufficiently broad so as to allow participants to establish personal portfolios that match their station in life (*i.e.*, age, marital status, income, and assets outside the plan).

The prudence of the selections made by the fiduciary are evaluated in part by the procedural measures and precautions taken, as ERISA does not mandate that there is one "correct" option that all plan fiduciaries must pursue, and therefore ERISA fiduciaries have a strong incentive to engage in a comprehensive selection process. *See Hunter v. Caliber Sys., Inc.*, 220 F.3d 702, 722 (6th Cir. 2000);

Frahm v. Equitable Life Assurance Soc'y of the U.S., 137 F.3d 955, 960 (7th Cir. 1998).

Once an investment selection has been made, the fiduciary's responsibility is to engage in ongoing monitoring of the investment option to determine if its objectives are being met and its performance is adequate by comparison to identified benchmarks or other metrics. *See* 29 C.F.R. § 2550.404a-1; *see also Tatum v. RJR Pension Inv. Comm.*, 761 F.3d 346, 358 (4th Cir. 2014) (finding "continuing to monitor and receive regular updates on the investment's performance" to be evidence of fiduciary prudence), *petition for cert. filed*, No. 14-656 (Dec. 1, 2014). The fiduciary compares the performance of the particular option selected for the plan with a benchmark or index of the other available investments of a similar kind and character. Absent a change in circumstances, the fiduciary does not revisit the initial determination to offer the option.

Unless there has been a material change in circumstances suggesting that a full due diligence review is necessary, the fiduciary's duty to monitor does not include the obligation to revisit the initial determination to include a particular investment option in the plan. Indeed, it would be highly impractical and expensive to periodically recreate the selection process of an investment option. Plan fiduciaries generally do not reconsider the choice of an investment option that is meeting its performance benchmarks. In this case, petitioners were unable to prove that circumstances warranted performing a "full due diligence review" at any time during the limitations period or that respondents' ongoing moni-

toring process was otherwise imprudent. Resp. Br. 39-40.

The difference between the two duties is clear from a simple, and common, example. A plan fiduciary may decide to include as a plan option a particular investment opportunity—*e.g.*, a regional real estate fund, an emerging markets fund, or a small-cap equity fund—or a particular investment structure—*e.g.*, an actively managed mutual fund, a passively managed index fund, or a stable value money market fund. Once the initial selection has been made, the monitoring duty requires the fiduciary to ensure that the particular option chosen is performing in line with other available options of similar kind and character—for example, that the emerging markets mutual fund option is on par with other available emerging markets mutual funds. *See* Resp. Br. 32-37, 39-42.

Petitioners' attempt to conflate the selection and monitoring duties is exposed in the DOL's argument that the fiduciaries in the instant case breached their "continuing duty of prudence . . . by failing to research fund options and offer available lower-cost institutional-class funds." DOL Br. 24-25. This alleged breach translates into a failure to continually research and replace investment options, and, taken to its logical extreme, would require ERISA fiduciaries to constantly reevaluate the balance within an entire portfolio in a search for the cheapest option. But the initial duty to assess investment options at the front end is not coextensive with the monitoring obligation, which requires a full due diligence review only in changed circumstances. Moreover, the courts, and even the DOL, have recognized that fidu-

ciaries are not obligated to select the mutual funds with the lowest fees. *See, e.g.*, *Loomis v. Exelon Corp.*, 658 F.3d 667, 672-73 (7th Cir. 2011).

Petitioners underscore this point, and the depth of their misunderstanding, by arguing that the Ninth Circuit's standard "ignores the fiduciary's responsibility to consider the prudence of the plan's investment lineup as a whole" because, in some instances, "it is necessary to examine the entire portfolio to determine whether an investment is prudent" as "[a]n investment may be imprudent for reasons unrelated to any changes in that particular investment." Pet. Br. 32-33. But this position would interpret "changed circumstances" much more narrowly than it is applied in practice, as the review conducted when circumstances are changed is not limited to a single investment and may extend to evaluating the portfolio as a whole.

B. Petitioners' Theory Is Not Supported By The Common Law Of Trusts

Petitioners and their *amici* cite the common law of trusts to support their argument that a fiduciary's duty to monitor an investment includes the ongoing duty to reassess the prudence of those investments. *See* Pet. Br. 25-30. The trust law authorities petitioners cite cannot support the weight that they and their *amici* place on them.

The sources of trust law relied upon by petitioners and their *amici* define a duty to monitor that cannot reasonably be read to extend to petitioners' claims here; rather, those authorities support the position that a fiduciary has a duty to monitor investment performance and only to reevaluate the entire

portfolio when a change in circumstances warrants it. For instance, a trust treatise upon which petitioners heavily rely indicates that a trustee has a "duty of examining and checking the trust investments periodically" because they might "depreciate in character" and, in doing so, the trustee must "consider[] certain factors . . . such as economic conditions." George T. Bogert et al., *The Law of Trusts and Trustees* § 684, at 145-46 (3d ed. 2009). The treatise goes on to say that "[i]nherent in this standard is the duty to reevaluate the trust's investments periodically as *conditions change*." *Id.* at 146 (emphasis added).

This language clearly envisions a fiduciary being vigilant about the *value* of the trust assets and reevaluating the investments upon changed conditions, which is consistent with the position adopted by the district court, and affirmed by the Ninth Circuit. *See* Pet. App. 19. Notably, the district court gave petitioners the opportunity to establish changed circumstances that would have warranted the performance of a "full due diligence review," but petitioners could not establish that one had occurred. Resp. Br. 15-16, 39-40.

Despite petitioners' protests to the contrary, the trust treatises cited by petitioners and their *amici* are consistent with the standard adopted by the Ninth Circuit. Although petitioners claim that "[n]othing in the Second Restatement endorse[s]" the position that a fiduciary does not need to conduct a complete review absent a change in circumstances, nothing in the sources they cite supports petitioners' contention that once an allegedly imprudent investment option is selected, a fiduciary operates under a

constant duty to realize that it was imprudent and to remove it. *Cf.* Pet. Br. 31. Petitioners' arguments in favor of this duty presuppose that a fiduciary is already aware that an investment option is imprudent, despite the fact that the investments they are actually challenging may be imprudent only in light of the other options available at the time of their selection, and therefore would have required a full due diligence review to uncover their alleged imprudence. *Cf. id.*

Neither petitioners nor their *amici* cite a single federal case that supports their view of a fiduciary's continuing duty to reevaluate the selection of an investment option in the absence of changed circumstance, much less one that extends that duty to apply under ERISA. Instead, petitioners and their *amici* rely on an 1891 decision of the New York Surrogate's Court. *In re Stark's Estate*, 15 N.Y.S. 729, 730-31 (Surrogate's Court 1891). But that 124-year-old case cannot carry the weight petitioners place on it. In the forty-year history of ERISA, neither this Court nor any federal court of appeals has ever accepted anything like the theory proposed by petitioners.[4]

In any event, although courts are guided by trust law in interpreting fiduciary duties under ERISA, this Court has recognized that "trust law does not tell the entire story" (*Varity*, 516 U.S. at 497), and

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[4] As best we can determine, only one federal court since ERISA's enactment has accepted petitioners' view that a fiduciary's monitoring function, even in the absence of changed circumstances, includes an evaluation of the prudence of the challenged investment option. *See Spano v. The Boeing Co.*, No. 3:06-CV-743-NJR-DGW, Slip. Op. at 10-19 (S.D. Ill. Dec. 30, 2014).

does not govern where ERISA's text or application has been held to diverge from the common law (*Fifth Third Bancorp v. Dudenhoeffer*, 134 S. Ct. 2459, 2469 (2014)). Where trust law does not resolve the specific issue, the "guiding principles . . . underlying ERISA," as well as the specific statutory provision Section 413(1), should be used to resolve the question. *Conkright*, 559 U.S. at 516. The common sense meaning and intent of Section 413 should not be ignored regardless of the pre-ERISA common law references made by petitioners and their *amici*.

In this instance, ERISA's core principles—particularly the balance achieved by regulatory consistency and protecting fiduciaries from perpetual exposure to litigation for decisions made perhaps decades before (and perhaps by other fiduciaries)—should guide the Court to reject the variant of the "continuing violation" theory that petitioners advance, and to apply Section 413(1) as it is written and as it was intended by Congress to operate.

C. Petitioners' Theory Is Contrary To Public Policy

Petitioners' unprecedented theory that ERISA fiduciaries must engage in constant, portfolio-wide evaluation of all aspects of the investment options offered to plan participants would not necessarily improve fiduciary decision-making. It would more likely hinder the operation of ERISA plans by spurring a significant increase in litigation, which would undermine the incentive to offer ERISA plans—to the detriment of plan participants and their beneficiaries.

ERISA fiduciaries are already subject to some of the "highest [fiduciary duties] known to the law" (*Donovan v. Bierwirth*, 680 F.2d 263, 272 n.8 (2d Cir. 1982)), and a concomitantly large volume of litigation challenging their performance of these duties. Indeed, lower courts have handed down a number of mandates as to the rigor expected in the duty of prudence and the expectations of thoroughness in monitoring that supplement the DOL's already voluminous regulations on that front. *See, e.g.*, *Howard v. Shay*, 100 F.3d 1484, 1489 (9th Cir. 1996) (failure to "make certain that reliance on [an] expert's advice is reasonably justified under the circumstances" is a breach of the duty of prudence). If proper attention is not given to a changed circumstance, a fiduciary may be held accountable. *See, e.g.*, *Pension Benefit Guar. Corp. v. Morgan Stanley Inv. Mgmt. Inc.*, 712 F.3d 705, 716 (2d Cir. 2013).

Moreover, ERISA fiduciaries must discharge their duties "with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims." 29 U.S.C. § 1104(a)(1)(B); *Dudenhoeffer*, 134 S. Ct. at 2465. Because fiduciaries must "balanc[e] competing interests under conditions of uncertainty," their decisions—for example, selecting investment options for a 401(k) plan—are entitled to substantial deference. *Armstrong v. LaSalle Bank Nat'l Ass'n*, 446 F.3d 728, 733 (7th Cir. 2006); *see Conkright*, 559 U.S. at 517; *Firestone*, 489 U.S. at 110-11.

Petitioners and their *amici* seek to dilute this deference, and its valuable role in minimizing the

courts' interference with plan design as well as ERISA litigation costs, by burdening ERISA fiduciaries with an unintended, ongoing, and ill-defined duty to constantly reevaluate plan offerings on top of their already established duty to monitor—which has never before been interpreted to include the duties petitioners and the DOL expound. Adoption of that rudderless view of fiduciary duties would leave thousands of ERISA fiduciaries adrift without a reasonable understanding of when they should review the prudence of continuing to offer an investment option selected years before, and perhaps by other fiduciaries, based on a comprehensive selection process.

This would be particularly punishing for sponsors and fiduciaries of small plans that do not have the resources to regularly hire consultants and legal counsel. Indeed, the vast majority of 401(k) plans are not sponsored by large employers and may not have the resources to adequately confront this ever-changing landscape. *See* U.S. Dep't of Labor, *Private Pension Plan Bulletin* 48 (2015), *available at* http://www.dol.gov/ebsa/pdf/2012pensionplanbulletin.pdf. The response by fiduciaries of small (and even large) 401(k) plans may be to reduce the number of investment options to a category of "safe" options where the risk is low, but the return lower and the opportunity for broad diversification among asset classes reduced.

Further, by seeking to impose a duty on fiduciaries to review the prudence of investment options selected by previous fiduciaries even in the absence of changed circumstances, the DOL position is contrary to ERISA Section 409(b), which provides that no fiduciary is liable for breaches of fiduciary duties be-

fore he or she became a fiduciary. *See* 29 U.S.C. § 1109(b). The resulting confusion and liability could unnecessarily increase the operational and litigation expenses of many ERISA plans, to the detriment of both plan sponsors and participants.

As petitioners and the DOL do not deny, adoption of their position would result in a drastic increase in fiduciary liability, which Congress did not intend. *See Mertens v. Hewitt Assocs.*, 508 U.S. 248, 257-59 (1993) (declining to read a remedy into ERISA where Congress did not expressly provide for it). Their theory could expose fiduciaries to potential liability for making decisions that were prudent at the time they were made in the context of providing plan participants with a wide range of options with which they could assemble their own portfolios, but are challenged as imprudent more than six years later, with all the benefits of hindsight.

That the adoption of petitioners' theory of liability would result in enormous costs to ERISA plans is well-illustrated in this specific context, where numerous current plan fiduciaries have chosen to include retail mutual funds in their plans. Petitioners' underlying case is a broadside attack on the inclusion of retail mutual funds in 401(k) plans, but many plan fiduciaries at the time made the same selection decision for reasons discussed in the respondents' brief. The selection of retail mutual funds as investment options is a decision to be made by fiduciaries on a case-by-case basis using a reasonable process and taking into account the objectives of the plan and all other relevant matters, such as the availability of other investment options. *See Loomis*, 658 F.3d at 672-73. Although fundamental to petitioners'

position, courts have rejected the proposition that retail mutual funds are somehow per se imprudent. *See Renfro v. Unisys Corp.*, 671 F.3d 314, 326-27 (3d Cir. 2011); *Hecker v. Deere & Co.*, 556 F.3d 575, 584-86 (7th Cir. 2009), *reh'g en banc denied*, 569 F.3d 708 (7th Cir. 2009). This is even true when institutional shares may be available. *See Loomis*, 658 F.3d at 672-73. Rather, courts have examined the entire mix of investment options made available to participants to determine if the plan fiduciaries have acted prudently. *See id.* To overturn the Ninth Circuit's decision and permit plaintiffs to litigate their retail-class theory would create significant litigation pressure on thousands of ERISA fiduciaries—thus upsetting the careful balance struck by Congress in crafting ERISA. *See supra* Part I.

The DOL's contrary assertion that upholding the Ninth Circuit's decision would "effectively exempt[] plan fiduciaries from a significant aspect of the trust-law duties imposed by ERISA once an investment has been in an ERISA plan for six years," DOL Br. 8-9, is incorrect. As already noted (*see supra* Parts I.A. & I.B.), ERISA fiduciaries are neither insulated from liability for their ongoing monitoring duties nor able to evade any applicable trust law duties. Rather, upholding the Ninth Circuit's position would only prevent the very type of litigation intended to be foreclosed by Section 413(1) and the vast amount of uncertainty and confusion that litigation over perhaps decades-old decisions would foster for sponsors, fiduciaries, and participants.

III. The DOL's Attempt To Regulate Via Litigation Warrants No Deference

The DOL's brief is a prime example of "regulation by litigation," an ad hoc process that creates enormous practical difficulties for fiduciaries trying to conform their conduct to the law, and warrants no deference from this Court. The DOL argues for the creation of a new standard of fiduciary responsibility previously unknown under ERISA and not previously articulated by the DOL. Indeed, the standard the DOL advances is not even foreshadowed by its regulations. It is inappropriate for the DOL to try to establish such a standard through litigation rather than the notice-and-comment regulatory process, where it would have the benefit of industry input. That is of particular concern where, as here, the DOL's litigation position, if adopted, would revive claims previously considered to be expired.

The DOL frequently issues guidance to ERISA fiduciaries about how to properly perform their duties, *see*, *e.g.*, U.S. Dep't of Labor, *Meeting Your Fiduciary Responsibilities*, *available at* http://dol.gov/ebsa/publications/fiduciaryresponsbility.html (last visited Jan. 22, 2015), and even how to evaluate certain classes of investments, *see*, *e.g.*, U.S. Dep't of Labor, *Target Date Retirement Funds – Tips for ERISA Plan Fiduciaries* (2013), *available at*. http://www.dol.gov/ebsa/pdf/fsTDF.pdf. Prior to its briefing in this case, the DOL has issued no guidance that supported the view that retail mutual funds are in some sense imprudent when institutional shares are available. So, fiduciaries who have acted entirely in accordance with then-applicable standards might

now face litigation exposure for the choices they or their predecessors have made.

The regulations the DOL *has* promulgated regarding the monitoring of fees require neither a full reassessment of the plan's portfolio absent changed circumstances nor that funds with objectively reasonable fees be set aside in favor of other, perhaps cheaper, options. Rather, the DOL regulations require a more robust reporting of fees from service providers to fiduciaries and the disclosure of those fees and expenses to plan participants where participants direct the investments of their own individual accounts. *See* 29 CFR § 2550.408b-2; 29 C.F.R. § 2550.404a-5.

Through those regulations, the DOL has already ensured that fiduciaries and plan participants have the fee and other expense information they need to make reasoned decisions about the investment options available to them in their plans. Without providing any further guidance as to the propriety of investing in retail mutual funds, much less fair notice to plan sponsors and fiduciaries that such funds are inappropriate investment options for 401(k) plans, the DOL is now supporting a litigation-driven approach to disapproving these funds, and its effort to do so warrants no deference from this Court. *See Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2166-67 (2012).

Prescription of what acts a fiduciary should take should be done by Congress, or if by the DOL via notice-and-comment rulemaking. Significantly, petitioners themselves admit that "there is no precise rule for how frequently" a fiduciary should reex-

amine their investments, but say that they should "examine the state of the [plan's] investments" from "time to time." Pet. Br. 26 (internal quotation marks omitted). Petitioners do not tell the Court whether that review should be undertaken quarterly, yearly, every five years, or on some other timeline. During the period when petitioners' inchoate standard would be litigated in the courts, thousands of plan fiduciaries would be operating under a cloud of uncertainty and millions of dollars may be spent on legal fees rather than benefitting the plans and their participants. If the DOL wants to create such an amorphous duty, it should go through the rulemaking process, with the benefits of notice and comment (and, if necessary, judicial review under the Administrative Procedure Act).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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AMICUS CURIAE BRIEF

No. 13-550

In The
Supreme Court of the United States

GLENN TIBBLE, et al.,

Petitioners,

v.

EDISON INTERNATIONAL, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF THE PENSION RIGHTS CENTER AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS CURIAE[1]

The Pension Rights Center is a nonprofit, nonpartisan consumer organization that has been working since 1976 to protect and promote the retirement security of workers, retirees, and their families. The Center represents the interests of retirement plan participants and beneficiaries before Congress, administrative agencies, and the courts.

Over the past three decades, the retirement landscape has shifted from guaranteed employer-paid traditional pensions in which employees are promised set monthly benefits for life, to voluntary employee-paid retirement savings arrangements, such as 401(k) plans, where an employee's retirement security depends on the employee's sophistication and ability to construct a suitable investment portfolio from the investment options that plan fiduciaries include in a plan's investment menu.

Recognizing the difficulties that participants face in managing their 401(k) accounts, the Pension Rights Center has devoted considerable attention to

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[1] Pursuant to Supreme Court Rule 37.6, counsel for amicus The Pension Rights Center represent that they authored this brief in its entirety and that none of the parties or their counsel, nor any other person or entity other than amicus, its members, or its counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Pursuant to Rule 37.3(a), counsel for amicus represent that all parties have consented to the filing of this brief.

improving 401(k) plan outcomes. The Center has testified before Congress and federal agencies concerning 401(k) fees, fiduciary responsibilities, and plan transparency. Examples include the Center's testimony on disclosure of 401(k) fees before the Senate Health, Education, Labor, and Pensions Committee, and on fiduciary status before the Department of Labor.[2] Center staff have written fact sheets and blogs on 401(k) fee and fiduciary issues, have been quoted in the national media, and have filed amicus briefs on 401(k)-related issues in this Court and others.[3]

Ensuring that 401(k) management and investment fees are no higher than necessary is a key component to improving 401(k) outcomes. The Center believes that the Court of Appeals' decision in this case, by effectively permitting plans to ignore the level of fees charged by a mutual fund once a fund has been a plan investment option for six years, will

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[2] *Testimony on 401(k) fee disclosure by Olena Berg Lacy on behalf of PRC to the Senate Health, Education, Labor, and Pensions Committee*, Pension Rights Center (September 17, 2008), http://www.pensionrights.org/newsroom/speeches-statements/testimony-401k-fee-disclosure-olena-berg-lacy-behalf-prc-senate-health-; *Testimony of Norman Stein before the Department of Labor on proposed regulations defining fiduciary*, Pension Rights Center (March 1, 2011), http://www.pensionrights.org/newsroom/speeches-statements/testimony-norman-stein-department-labor-proposed-regulations-defining-f.

[3] See www.pensionrights.org for fact sheets, blogs, news articles, and Center amicus briefs related to 401(k) issues.

result in higher fees and thus lower retirement savings for participants in 401(k) plans. The Center believes it is essential to recognize that a plan fiduciary has a continuing duty to periodically monitor plan investment options for prudence and that plan participants are able to enforce this duty.

SUMMARY OF THE ARGUMENT

The Court of Appeals erred in ruling that participants in a 401(k) plan cannot challenge the continued offering of mutual funds that charge excessive fees more than six years after the funds were chosen unless the participants show that changed circumstances should have prompted the plan's fiduciaries to conduct a review of those fees. Participants should be permitted to enforce the fiduciary duty to review and replace imprudent investments more than six years after the funds were chosen in light of the mechanics of the market for mutual funds available to 401(k) plans. Participants in plans managed by fiduciaries who do not comply with the duty to review and replace imprudent investments will pay unnecessarily high fees on their retirement savings. Further, insulating fiduciaries from claims challenging their failure to monitor mutual fund expenses after six years will reduce competition over fees and raise the cost of mutual fund investments in 401(k) plans, thereby eroding the retirement savings of American workers.

Restricting participants' ability to require 401(k) plan fiduciaries to replace overpriced investment options after they have been retained in the plan for more than six years is unsupported by the Employee Retirement Income Security Act of 1974 ("ERISA"), which requires fiduciaries to review and replace imprudent investments on a periodic basis. A fiduciary's failure to review and replace imprudent investments constitutes a distinct breach of fiduciary duty that is separate from any breach that occurred when the funds were selected. Because Tibble alleges violations of the duty to review and replace imprudent investments that occurred within the limitations period set by 29 U.S.C. § 1113(1), the Court of Appeals' judgment should be reversed.

ARGUMENT

I. THE COURT OF APPEALS' RULING WOULD REDUCE COMPETITION OVER MUTUAL FUND EXPENSES AND INCREASE THE COST OF 401(K) PLAN INVESTMENTS

The Court of Appeals' ruling would reduce mutual funds' incentive to compete in terms of fees offered to 401(k) plans, thereby increasing the cost of mutual funds to all 401(k) plan participants. If the Court of Appeals' holding were affirmed, even participants in plans that continued monitoring the fees charged by mutual fund providers might pay higher fees overall as a result of reduced competition.

Mutual funds "have become the primary vehicle for 401(k) plan investments, with the share of employer-sponsored 401(k) plan assets held in mutual funds jumping sevenfold – from 9 percent at year-end 1990 to 63 percent at year-end 2013." 20 Investment Company Institute, *The Economics of Providing 401(k) Plans*, ICI Research Perspectives 2 (July 2014) [hereinafter *2014 ICI Research Perspectives*], *available at* www.ici.org/pdf/per20-03.pdf. Mutual funds held in defined contribution plans and individual retirement accounts constituted twenty-eight percent, or $6.5 trillion, of the U.S. retirement market in 2013. Investment Company Institute, *2014 Investment Company Fact Book* 147 (54th ed. 2014) [hereinafter *2014 ICI Fact Book*], *available at* www.icifactbook.org. As mutual funds have increased as a percentage of retirement plan assets, their costs have declined. Average expense ratios of mutual funds in 401(k) plans declined by twenty-five percent for equity funds, twenty-one percent for bond funds, and nineteen percent for mixed bond and equity funds since 2000. *2014 ICI Research Perspectives*, *supra*, at 1.

Competition among mutual fund providers has contributed significantly to the decline in expense ratios. *See id.* at 11 ("Both inside and outside the 401(k) plan market, mutual funds compete among themselves and with other financial products."); John C. Coates, IV & R. Glenn Hubbard, *Competition in the Mutual Fund Industry*, Harvard Law and Econ. Discussion Paper No. 592, August 2007, pt. III, *available at* http://ssrn.com/abstract=1005426 (collecting

evidence of price competition in mutual fund industry); Brian Reid, Investment Company Institute, *Competition in the Mutual Fund Business*, Research Commentary 6 (2006), *available at* http://www.ici.org/pdf/rc_competition.pdf ("[S]hareholders reward funds that are best able to deliver performance and service at a competitive level of fees.").

Competition over price depends on fiduciaries actively comparing the cost and performance of alternative funds and substituting funds when cheaper or better-performing alternatives are available. *See 2014 ICI Research Perspectives*, *supra*, at 11 ("In the 401(k) plan market, performance and cost-conscious plan sponsors also impose market discipline [by] regularly evaluat[ing] the performance of the plans' investments, and performance reflects fees." (footnote omitted)). Empirical evidence corroborates that plan fiduciaries conduct this monitoring activity on an ongoing basis. *See* Deloitte et al., *Annual Defined Contribution Benchmarking Survey* 27 (2014) (survey of 265 defined contribution plan sponsors, reporting that in 2013, sixty-five percent of plans reviewed funds' investment performance on a quarterly basis, seventeen percent semiannually, and thirteen percent annually, and that seventy-one percent handle underperforming funds by replacing them). By shielding fiduciaries from liability for failing to monitor plan investments after six years, the Court of Appeals' ruling would reduce the incentive for fiduciaries to select lower-cost, better-performing mutual funds and

undercut the competitive trend that has driven down costs borne by 401(k) plan participants.

Eliminating participants' right to seek recovery from fiduciaries who fail to replace overpriced investment options with less expensive equivalents after six years will have serious consequences for 401(k) plan participants. A participant who invested last year in an equity mutual fund charging last year's average rate paid twenty-five percent less in fees for her investment than a participant who invested and paid the average rate in 2000. *See 2014 ICI Research Perspectives*, *supra*, at 1. Over the lifetime of a typical retirement investment, even marginal differences in mutual fund expenses translate to significant decreases in participants' investment returns and aggregate retirement savings. *See* U.S. Securities and Exchange Commission, Office of Investor Education and Advocacy, *Investor Bulletin: Mutual Fund Fees and Expenses* 1-2 (May 12, 2014), *available at* www.sec.gov (providing example showing fourteen percent decrease in investment return due to .75 percentage point increase in annual expenses over 20 years). If the fiduciaries responsible for choosing the investment options in participants' 401(k) plans do not take advantage of declining expense ratios by replacing their initial investments with cheaper alternatives, the benefits of competition in the form of decreased fund expenses are lost to the participants. Allowing fiduciaries to remain passive while participants' retirement savings are eroded by avoidably high fees is incompatible with ERISA fiduciaries' fundamental

duty "to preserve and maintain" participant investments. *Central States, Southeast & Southwest Areas Pension Fund v. Central Transp., Inc.*, 472 U.S. 559, 572 (1985).

II. EDISON VIOLATED THE DUTY TO REVIEW AND REPLACE IMPRUDENT INVESTMENTS WITHIN THE STATUTE OF LIMITATIONS PERIOD

A. ERISA's Duty of Prudence Includes the Duty to Monitor and Replace Imprudent Investments

29 U.S.C. § 1104(a)(1)(B) provides that

> a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and . . . with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims[.]

This provision "imposes 'strict standards of trustee conduct . . . derived from the common law of trusts[.]'" *Fifth Third Bancorp v. Dudenhoeffer*, 134 S. Ct. 2459, 2465 (2014) (quoting *Central States*, 472 U.S. at 570). Among the principles developed in the law of trusts is the trustee's "continuing duty to see to it that the trust remains appropriately invested." 4 Austin Wakeman Scott et al., *Scott & Ascher on Trusts* § 19.4, p. 1451 (5th ed. 2007); G. Bogert & G. Bogert,

Law of Trusts and Trustees § 684, pp. 147-48 (3d ed. 2009) ("The duty to review trust investments" includes "a systematic consideration of all the investments of the trust at regular intervals."). If it is improper to retain a particular trust investment, the trustee has a duty to dispose of the investment within a reasonable time. 4 Scott, *supra*, at 1439.

For example, in *In re Stark's Estate*, 15 N.Y.S. 729 (N.Y. Surr. Ct. 1891), the court held that a trustee who retained mortgages that were depreciating in value and had defaulted on interest payments at the time they were added to the trust breached separate duties, "*first*, in making the original investment of the fund; and, *second*, in the failure to use such proper care, watchfulness, and oversight ... as men in general of ordinary intelligence and prudence in such matters exercise in their own affairs." *Id.* at 732. The trustee's failure to review and replace the trust's mortgage investments constituted an independent breach of duty, distinct from the original selection of the investment, because

> [i]t is not by a prudent investment alone that a trustee performs his whole duty in regard to a trust fund. He is still bound to be watchful, keep himself informed ... and take notice of all those things affecting the investment which a man of fair judgment, care, and prudence would take and keep in

> consideration in the matter of a loan of his own moneys[.]

Id. at 731.[4]

Similarly, in *State St. Trust Co. v. De Kalb*, 157 N.E. 334 (Mass. 1927), trustees were held liable for retaining mortgage investments as part of the trust over an eleven-year period, despite knowing that the mortgages were declining in value at the time they became responsible for the trust. *Id.* at 335-36. Pre-ERISA cases from other jurisdictions were in accord that trustees have an ongoing duty to review and replace imprudent investments and that this monitoring duty is distinct from the duty to act prudently when the investments are initially made or received. *E.g.*, *In re Allis' Estate*, 209 N.W. 945, 948 (Wis. 1926) (statute authorizing investment in particular stock "did not relieve the trustees from the duty of exercising the degree of diligence and prudence required of trustees in determining whether this stock should be continued as an investment for these trust funds"). Courts interpreting ERISA's fiduciary duties have recognized that the duty to review and replace inappropriate investments was "well established at common law" at the time of ERISA's enactment. *Morrissey v. Curran*, 567 F.2d 546, 549 n.9 (2d Cir. 1977) (citing

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[4] *Accord In re Cady's Estate*, 207 N.Y.S. 385, 376 (N.Y. App. Div. 1925) (trustee "neither acted originally in good faith in the exercise of sound discretion nor after he obtained [trust investments] with reasonable care in protecting the estate against loss").

3 Austin Wakeman Scott, *The Law of Trusts* § 209 (3d ed. 1967)).

No "competing congressional purposes" justify excusing ERISA fiduciaries from these trust law duties. *Varity Corp. v. Howe*, 516 U.S. 489, 489 (1996). Departing from the trust law standard would "afford less protection to employees and their beneficiaries than they enjoyed" at common law, *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 114 (1989), contravening "Congress' desire to offer employees enhanced protection for their benefits[.]" *Varity*, 516 U.S. at 497. The weight of authority among the Courts of Appeals recognizes that ERISA fiduciaries must review plan investments periodically to determine whether they should be retained or sold and that this duty is distinct from the obligation to act prudently when selecting investments.[5] Holding that

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[5] *See Pfeil v. State St. Bank & Trust Co.*, 671 F.3d 585, 597 (6th Cir. 2012) (plan administrator bore fiduciary responsibility for both selection and monitoring of defined contribution plan investment options), *abrogated on other grounds by Fifth Third Bancorp v. Dudenhoeffer*, 134 S.Ct. 2459 (2014); *Howell v. Motorola, Inc.*, 633 F.3d 552, 567 (7th Cir. 2011) ("[W]e agree with the position taken by the Secretary of Labor in her amicus curiae brief that the selection of plan investment options and the decision to continue offering a particular investment vehicle are acts to which fiduciary duties attach."); *Langbecker v. Electronic Data Sys. Corp.*, 476 F.3d 299, 312 (5th Cir. 2007) (noting distinct duties of "selection and monitoring of plan investments alternatives"); *DiFelice v. U.S. Airways, Inc.*, 497 F.3d 410, 418 n.3 (4th Cir. 2007) (ERISA's fiduciary standards apply to "initially choosing or continuing to designate investment alternatives" in defined contribution plan) (quoting Letter from the Pension and

(Continued on following page)

prudence claims challenging fiduciaries' failure to review and sell imprudent investments are time-barred because the fiduciaries also violated their duties in *choosing* the investments would eliminate the distinction between these separate duties and "would recognize no obligation on the part of a plan fiduciary to dispose of unsound investments once he had been neglectful for six years[.]" *Buccino v. Cont'l Assurance Co.*, 578 F. Supp. 1518, 1521 (S.D.N.Y. 1983).

Enabling participants to challenge fiduciaries' failure to monitor and replace imprudent investments more than six years after the investments were made would not require fiduciaries to screen investments daily. *See* 4 Scott, *supra*, at 1451 ("The trustee need not, perhaps, watch the ticker as closely as a day trader would[.]"). The common law looked to "'the usual conduct of the man of average prudence in the care of his own estate . . . in making permanent investment of his savings outside of ordinary business risks'" to determine the prudence of a trustee's investment actions. *In re Cook's Estate*, 171 A. 730, 731 (Del. Ch. 1934) (quoting *Mattocks v. Moulton*, 24 A. 1004, 1006 (Me. 1892)). Similarly, ERISA requires

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Welfare Benefits Administration, U.S. Dep't. of Labor, to Douglas O. Kant, 1997 WL 1824017, at *2 (Nov. 26, 1997)); *Martin v. Consultants & Adm'rs., Inc.*, 966 F.2d 1078, 1087-88 (7th Cir. 1992) (faulting trustees for "ignor[ing] the continuing nature of a trustee's duty under ERISA to review plan investments and replace imprudent ones"); *Morrissey v. Curran*, 567 F.2d 546, 548-49 (2d Cir. 1977) (holding that ERISA fiduciaries, like common-law trustees, must review plan investments and dispose of imprudent ones).

fiduciaries to act according to the standard of "a prudent man acting in a like capacity and familiar with such matters . . . in the conduct of an enterprise of a like character and with like aims[.]" 29 U.S.C. § 1104(a)(1)(B).

Empirical evidence demonstrates that the prevailing practice among fiduciaries "acting in a like capacity" is to review plan investments on a quarterly or other periodic basis and to replace imprudent funds with better alternatives. According to a survey of 265 defined contribution plan sponsors conducted by Deloitte, sixty-five percent of respondents reported that they evaluated fund performance quarterly,[6] seventeen percent did so semi-annually, and thirteen percent did so annually. Deloitte et al., *supra*, 27. In addition, seventy-one percent of respondents reported that they replaced funds that underperformed. *Id.* These results were approximately the same in each of the three survey years reported. *Id.* Because fiduciaries generally monitor and replace investments on a regular basis, no significant additional costs will be imposed on plan fiduciaries by requiring them to continue their existing practices. *See Metro. Life Ins. Co. v. Glenn*, 554 U.S. 105, 113 (2008) (applying trust-law standards absent a "significant inconsistency" with other purposes).

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[6] Because mutual funds' expenses are paid out of fund assets, the funds' "performance reflects fees." *2014 ICI Research Perspectives*, *supra*, at 11.

Department of Labor regulations facilitate fiduciaries' monitoring duty by requiring service providers to disclose their compensation "with respect to each investment contract, product, or entity that holds plan assets," both initially and upon request by the fiduciary, or whenever the service provider's compensation changes. 29 C.F.R. § 2550.408b-2(c)(iv)(E); *see id.* § 2550.408b-2(c)(v)-(vi). In the 2014 Deloitte survey, sixty percent of respondents acknowledged that these disclosures would enable them to manage plan investments more actively. Deloitte et al., *supra*, at 32 ex. 6.11. Thirty-five percent of respondents who thought the disclosures would have a "low impact" thought so because "most plan sponsors already have access to this information and are actively managing fees already." *Id.* Moreover, because the prudent person standard "is not concerned with results," fiduciaries who comply with the duty to review plan investments will not be held liable merely because the investments performed poorly. *Roth v. Sawyer-Cleator Lumber Co.*, 16 F.3d 915, 918 (8th Cir. 1994). Rather, they will be liable if they did not "employ[] the appropriate methods to investigate the merits of the investment[,]" *Katsaros v. Cody*, 744 F.2d 270, 279 (2d Cir. 1984) (internal quotation marks omitted), and replace investments that were imprudent to retain.

B. The Edison Fiduciaries Breached the Duty to Monitor and Replace Imprudent Investments Within the Statute of Limitations

The Court of Appeals erred in construing the Edison fiduciaries' alleged breaches of the duty to review plan investments periodically and replace imprudent ones as a failure to remedy an earlier breach that occurred when the investments were selected. Pet. App. 18 (claiming Tibble "confus[ed] the failure to *remedy* the alleged breach of an obligation, with the commission of an alleged *second* breach, which, as an overt act of its own recommences the limitations period" (internal quotation marks omitted)). Contrary to the Court of Appeals' holding, because the duty to review and replace inappropriate investments is distinct from the duty to act prudently when selecting investments initially, failure to remove an imprudent investment *is* "an alleged *second* breach[.]" *Id.* (internal quotation marks omitted).

The Court of Appeals for the Second Circuit recognized as much in *Morrissey v. Curran*, 567 F.2d 546 (2d Cir. 1977), where a participant challenged the investment of an employee benefit plan in an allegedly imprudent venture. *See id.* at 548. The district court concluded that the act of making the investment did not constitute a breach of any duty governed by ERISA or other federal law because the investment was made prior to ERISA's enactment. *See id.* at 547. The Court of Appeals reversed, holding that regardless of whether the original decision to make the investment was subject to ERISA, the

fiduciaries' failure subsequently to review and remove this investment after ERISA's enactment constituted a separate breach of the ERISA-imposed duty "to dispose of any part of the trust estate which would be improper to keep." *Id.* at 548-49.

Similarly, in *Martin v. Consultants & Administrators, Inc.*, 966 F.2d 1078 (7th Cir. 1992), the Department of Labor ("DOL") challenged the award of a series of contracts to a dental services provider in exchange for kickbacks. *Id.* at 1082. The plan fiduciaries argued that the DOL's suit challenged the bidding procedure for the contracts and, because that procedure was established after the applicable limitations period expired, the DOL's suit was barred as to both the initial contract and a subsequent contract awarded according to the same procedure. *Id.* at 1087. The Seventh Circuit rejected this defense as to the second contract because, notwithstanding that the bidding procedure was adopted after the statute of limitations expired, the award of the second contract constituted "a repeated, rather than a continued, violation" of the fiduciaries' obligation "to review plan investments and eliminate imprudent ones." *Id.* at 1087-88.

As in *Morrissey* and *Martin*, Tibble alleges violations of the duty to monitor and replace plan investments within the applicable limitations period. 29 U.S.C. § 1113(1) establishes two limitations periods, one (Subpart (A)) that runs six years from "the last action which constitutes a part of the breach," and another (Subpart (B)) that, "in the case of an

omission," runs from "the latest date on which the fiduciary could have cured the breach." 29 U.S.C. § 1113(1)(A)-(B). Tibble alleges that the Edison fiduciaries breached duties "to monitor the fees and expenses paid by the Plan," thereby "causing and/or allowing the Plan to pay fees and expenses that were . . . unreasonable," and to "establish, implement, and follow procedures to properly and prudently determine whether the fees and expenses paid by the Plan were reasonable[.]" J.A. at 92 & 93.

The District Court found that all three of the challenged funds were held by the Plan no less recently than October 2007. Pet. App. 94, 96, 97. Accordingly, under Subpart (A), the "last action which constitutes part of the breach" was the fiduciaries' failure to use prudence in monitoring the fees charged by the challenged retail funds until 2007. 29 U.S.C. § 1113(1)(A). Alternatively, Tibble's allegations that the Edison fiduciaries failed to comply with their monitoring obligations readily may be characterized as "omissions," and therefore subject to the limitations period in § 1113(1)(B). *See* "Omission," Black's Law Dictionary 1197 (9th ed. 2009) ("A failure to do something; esp., a neglect of duty."); "Omission," Webster's Seventh New Collegiate Dictionary 589 (1970) ("[A]pathy toward or neglect of duty."). Although Tibble argued under both subparts

of 29 U.S.C. § 1113(1),[7] the Court of Appeals confined its analysis to Subpart (A) of § 1113(1), but recognized that Tibble's claims would be timely under Subpart (B). Pet. App. 18 (acknowledging that "in the case of omissions the statute already embodies what the beneficiaries urge"). Under Subpart (B), the "latest date on which the fiduciaries could have cured the breach" by replacing the challenged funds with their cheaper institutional equivalents also occurred no earlier than 2007. 29 U.S.C. § 1113(1)(B); *cf.* "Cure," Black's Law Dictionary 439 (9th ed. 2009) ("To remove legal defects or correct legal errors."). Because Tibble filed his lawsuit in August of 2007, his prudence claims are timely under either subpart of § 1113(1).

The Court of Appeals' decision is unfounded in its concern that § 1113(1)(A) would be "meaningless" if participants are allowed to challenge the prudence of offering overpriced funds more than six years after they were added to the plan. Pet. App. 18 (internal quotation marks omitted). Under Tibble's interpretation, § 1113(1)(A) will prevent participants from suing for breaches of the failure to monitor and replace imprudent investments that occurred more than six years in the past. Similarly, any losses recoverable by participants will be limited to losses caused by

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[7] *See* Pet. C.A. Br. at 16 (arguing that "'the latest date on which the fiduciary could have cured the breach'" occurred within six years (quoting 29 U.S.C. § 1113(1)(B))).

fiduciaries' failures to review and replace imprudent investments that occurred in the past six years.

CONCLUSION

The judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

No. 13-550

IN THE
Supreme Court of the United States

GLENN TIBBLE, ET AL.,
Petitioners,

v.

EDISON INTERNATIONAL, ET AL.,
Respondents.

On Writ of Certiorari
to the United States Court Of Appeals
for the Ninth Circuit

BRIEF FOR THE SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION AS *AMICUS CURIAE* SUPPORTING RESPONDENTS

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INTEREST OF THE *AMICUS CURIAE*

The Securities and Financial Markets Association (SIFMA) is a securities industry trade association representing the interests of hundreds of securities firms, banks, and financial asset managers across the United States.[1] SIFMA's mission is to support a strong financial sector while promoting investor opportunity, capital formation, job creation, economic growth, and the cultivation of public trust and confidence in the financial markets. SIFMA members not only sponsor 401(k) plans for their own employees, they also regularly provide administrative, investment advisory, and other services to unaffiliated retirement plans. SIFMA and its members therefore have an interest in ERISA litigation, and SIFMA regularly files *amicus curiae* briefs in ERISA cases like this one, which raise issues of concern to plan sponsors and other fiduciaries. *See, e.g.*, *Fifth Third Bancorp. v. Dudenhoeffer*, 134 S. Ct. 2459 (2014); *Tolbert v. RBC Capital Markets Corp.*, 758 F.3d 619 (5th Cir. 2014); *Renfro v. Unisys Corp.*, 671 F.3d 314 (3d Cir. 2011); *Gearren v. McGraw Hill Cos.*, 660 F.3d 605 (2d Cir. 2011).

As 401(k) plans and other defined-contribution plans have increasingly replaced defined-benefit plans, lawsuits like this one have followed. In these class action suits, plaintiffs allege—with 20/20 hindsight and often long after-the-fact—that plan fiduciaries breached their obligations to participants

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[1] All parties have consented to the filing of this brief in letters filed with the Clerk. No counsel for a party authored this brief in whole or in part, and no person other than the *amicus*, its members, and its counsel made any monetary contribution intended to fund the preparation or submission of this brief.

when selecting the plan's investment options. If, as petitioners propose, there is no repose for investment decisions made years earlier, the ongoing risk of such litigation may require fiduciaries, including SIFMA members and their affiliates, to spend unnecessary time and money repeatedly reevaluating past decisions—time and money that otherwise could be used to benefit plan participants in other ways. In some cases, the unnecessary cost and burden could even discourage the formation of 401(k) plans in the first place. SIFMA has a strong interest in averting such a result.

SIFMA also has a strong interest in debunking the contentions that lie at the heart of petitioners' theory: that it is *necessarily* imprudent for a plan fiduciary to decide to offer retail share classes of mutual funds to plan participants, and that fiduciaries *necessarily* must reexamine that decision each and every time they give any thought to any of the plan's investments, even when nothing has changed. As explained below, there are good reasons why prudent fiduciaries (including fiduciaries for numerous 401(k) plans sponsored by SIFMA members) choose to offer to plan participants retail share classes of mutual funds, rather than institutional share classes or other types of investment vehicles. And there are good reasons why such a decision ought to be entitled to repose.

STATEMENT

Petitioners' counsel brought this case as part of a multi-front attack on the use of mutual funds for 401(k) plans. Although the question presented has been reformulated to focus on petitioners' most recent theory, that theory is merely the latest of many, all aimed at getting the courts to declare a

wide swath of commonly held investments to be categorically imprudent.

Since the 1990s, mutual funds have been by far the most popular investment vehicle for 401(k) plans. More than half of all 401(k) plan assets are held in mutual funds, and nine out of ten 401(k) plans include mutual funds on their investment menu.[2] In spite of this popularity—or, perhaps, because of it—over the past decade petitioners' counsel and other plaintiffs' lawyers have put forth numerous theories for why it is imprudent—and, thus, a breach of fiduciary duty—to choose to offer mutual funds as investment options for 401(k) plans.

At first, petitioners' counsel argued in this and other cases that it is *per se* imprudent to choose to offer mutual funds rather than other, purportedly less expensive investment products. But this argument was universally rejected by the courts, which recognized that mutual funds offer numerous advantages over other types of investment vehicles.[3]

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[2] *See The Economics of Providing 401(k) Plans: Services, Fees, and Expenses, 2012*, ICI Research Perspective, June 2013, at 2, *available at* http://www.ici.org/pdf/per19-04.pdf [hereinafter *Economics of Providing 401(k) Plans*] ("In the past two decades, mutual funds have become a primary provider of 401(k) plan investments, with the share of employer-sponsored 401(k) plan assets held in funds increasing from 9 percent in 1990 to 60 percent at year-end 2012."); Deloitte Development LLC, Defined Contribution / 401(k) Fee Study 15 (2009), *available at* http://www.ici.org/pdf/rpt_09_dc_401k_fee_study.pdf [hereinafter Deloitte 401(k) Fee Study] (noting that mutual funds are "the most common investment vehicle used by [401(k)] plans," with "91% of plans offering them").

[3] *See, e.g.*, Pet. App. 53-54; *Loomis v. Exelon Corp.*, 658 F.3d 667, 671-72 (7th Cir. 2011); *Renfro v. Unisys Corp.*, 671 F.3d

Petitioners' counsel also argued (once again, unsuccessfully) that the common practice of "revenue sharing" between mutual fund service providers and 401(k) plan service providers violates ERISA. *See* Pet. App. 45.[4]

By the time this case made its way to trial, petitioners' principal arguments—that defendants violated ERISA by selecting mutual funds as investment options for plan participants and by engaging in revenue sharing—had both been squarely rejected. *See* Pet. App. 45-46, 53-54. So, on the eve of trial, well *after* the summary judgment ruling on the statute of repose that is under review here, petitioners' counsel came up with a new theory: that it was *per se* imprudent to offer *retail share*

314, 326-27 (3d Cir. 2011); *Hecker v. Deere & Co.*, 556 F.3d 575, 584-87 (7th Cir. 2009). For example, when compared to institutional investment products, such as separate accounts or commingled pools, mutual funds offer greater transparency and ease of valuation, *see Loomis*, 658 F.3d at 671-72; portability of funds for plan participants, *id.* at 672; and substantial regulatory safeguards, including investment diversification requirements, limitations on leverage, and mandatory oversight by a primarily independent board of directors, *see* 15 U.S.C. § 80a-18(f); 26 U.S.C. § 851(b)(3); 17 C.F.R. § 270.0-1(a)(7).

[4] As explained below, *see infra* Section I.A.2, revenue-sharing arrangements typically require mutual fund service providers to share some portion of the fees they collect on 401(k) plan assets with the plan's administrative service provider. *See, e.g.*, U.S. Dep't of Labor, Advisory Op. 97-15A, at 1-2 (May 22, 1997) [hereinafter DOL Advisory Op. 97-15A] (describing a revenue-sharing arrangement between a mutual fund and a 401(k) service provider). This sharing of fees reflects the reality that, for plan investments, the plan's service provider performs many of the administrative services that otherwise would have to be performed by the mutual fund's service provider.

classes of mutual funds, when less expensive *institutional share classes* of those same mutual funds may have been available. It is this final substantive theory—which was expressly rejected by the court of appeals, Pet. App. 55[5]—that is now embedded in the question presented and that we address below.

SUMMARY OF ARGUMENT

Although the question presented to this Court concerns the applicability of ERISA's statute of repose, the Court chose to reframe that question in the narrow context of a particular factual claim—"that ERISA plan fiduciaries breached their duty of prudence by offering higher-cost retail-class mutual funds to plan participants, even though identical, lower-cost institutional-class mutual funds were available." Pet. Br. i. In presenting their repose argument, petitioners repeatedly suggest, as if it were a foregone conclusion, that retail share classes of mutual funds are an inherently imprudent investment vehicle for 401(k) plans, at least where

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[5] Petitioners imply in their brief (at 39-40) that they prevailed below on that theory, but that suggestion misconstrues the court of appeals' holding in this case. *See* Pet. App. 55 (rejecting plaintiffs' "broadside" challenge "against retail-class mutual funds"). "The basis of liability" that the court of appeals upheld on deferential review "was not the mere inclusion of retail-class shares," *id.* at 60-61, nor was it the failure to remove such shares. Rather, the Ninth Circuit affirmed the district court's finding that respondents had failed to conduct a sufficiently thorough review before the (non-time-barred) share classes were selected. And that holding is of no help to petitioners here, because the issue before this Court pertains to selection decisions that were made more than six years before petitioners filed suit.

institutional share classes are also available. This assertion is the latest in a series of attacks made by petitioners' counsel, in this and other cases, on the selection of mutual funds as an investment vehicle for 401(k) plans. But, like the prior arguments raised by petitioners' counsel, this assertion is unfounded. In fact, retail share classes of mutual funds may well be a prudent choice for 401(k) plans, even where institutional share classes are also available.

The choice between retail share classes and institutional share classes is not, as petitioners suggest, a narrow, black-and-white choice between a more expensive and a less expensive investment option. Rather, it is a decision that must be made in the context of the total costs, interests, and objectives of the plan. As explained in detail below, when a plan offers retail share classes of mutual funds, it has a greater opportunity, through the use of a practice called "revenue sharing," to offset or even eliminate separate administrative service fees that the plan (and, thus, its participants) otherwise would be required to bear.[6] Accordingly, the choice between retail and institutional shares is, in essence, a choice about how to pay for the administrative expenses of a plan. And a prudent fiduciary may (and often does) choose to cover these expenses through revenue sharing—a decision that, in turn, typically necessitates the selection of retail shares.

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[6] Although some 401(k) plans (including the Edison plan at issue here) require the plan sponsor to bear the costs of administrative services, more often "participants bear the majority of 401(k) costs." Deloitte 401(k) Fee Study 17.

Moreover, this precise factual scenario—a fiduciary considering the choice between retail and institutional shares in the broader context of its decision about how to pay for administrative services—illustrates perfectly why petitioners' interpretation of ERISA's repose statute cannot be correct. A fiduciary's decision about whether to pay for administrative services with revenue sharing from retail shares, or to offer institutional shares and pay hard-dollar administrative service fees, is a complex one that may appropriately take into account numerous factors and involve examination of voluminous data. If petitioners were right, and fiduciaries were required to constantly reassess this decision even in the absence of any changed circumstances (or else face lawsuits like this one, filed years after-the-fact), it would lead to a result that is not only wholly unworkable, but also potentially quite costly for the plan. And, as this Court has recognized, when Congress enacted ERISA it sought to avoid imposing precisely such undue "administrative costs, or litigation expenses," which risk "discourag[ing] employers from offering [ERISA] plans in the first place." *Conkright v. Frommert*, 559 U.S. 506, 517 (2010) (second alteration in original) (internal quotation marks omitted).

The Court should affirm the decision below.

ARGUMENT

Petitioners' argument about timeliness depends on accepting their skewed portrayal of the fiduciary decisions they challenge. Petitioners contend that retail share classes are always inferior, and obviously so, because of their fee structure. If retail share classes are so obviously inferior, petitioners

reason, then every time a fiduciary sees a retail share class listed on the ERISA plan's investment menu and does nothing about it, the fiduciary is making a conscious—and imprudent—choice to pay higher fees. But that is not so.

The choice between retail and institutional share classes is not a simple comparison of sticker prices. In fact, determining which option will be better for the plan is a far more complex task than petitioners would have it. And, in this case, that choice was made more than six years before petitioners filed suit. Petitioners' claim is therefore time-barred.

I. A PRUDENT FIDUCIARY, CONSIDERING THE INTERESTS OF THE PLAN AS A WHOLE, COULD SELECT RETAIL SHARE CLASSES OF MUTUAL FUNDS OVER INSTITUTIONAL SHARES.

Throughout their brief, petitioners assert that the choice between retail and institutional share classes of mutual funds is a simple and obvious choice between a more expensive option (retail shares) and a less expensive option (institutional shares)—and, thus, that selection of the purportedly more expensive option (retail shares) will *always* be imprudent. *See, e.g.*, Pet. Br. 32 ("[S]ome investments (such as retail-class shares of a mutual fund that offers institutional-class shares providing the same investment with lower fees) are imprudent in any portfolio."); *id.* at 39-41, 47 n.32. But, in making this assertion, petitioners focus on only one aspect of plan expenses and ignore the impact of share-class selection on the plan's total costs. And, as explained below, when a fiduciary takes into account all plan fees and expenses, it often may

prudently decide to select retail shares over institutional shares.

A. 401(k) Plans Pay Several Different Types Of Fees That May Be Affected By The Choice Between Retail And Institutional Share Classes.

Retail share classes of mutual funds can have real benefits for 401(k) plans. The extent of those benefits depends on the nature of the plans' service arrangements, and how those services are priced. All 401(k) plans require two principal types of services: (1) investment management services, which are provided by the investment advisors to the mutual funds and other investment options offered by the plan, and (2) recordkeeping and other administrative services, which are provided by 401(k) plan service providers that are engaged directly by the plans or their sponsors or administrators.[7] As explained further below, in asserting that retail share classes of mutual funds are a *per se* imprudent choice, petitioners improperly focus solely on the costs associated with the first category of services, completely ignoring the costs associated with the second category.

1. Services in the first category—investment management services—are paid for through an asset-based fee assessed by investment advisors upon the mutual funds and other investment vehicles in which plan participants invest. These

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[7] *See* U.S. Dep't of Labor, A Look at 401(k) Plan Fees 2-3 (2013), *available at* http://www.dol.gov/ebsa/publications/401k_employee.html [hereinafter DOL 401(k) Plan Fees]; Deloitte 401(k) Fee Study 10; *Economics of Providing 401(k) Plans* 3, 4.

investment management fees are included in the fund's "expense ratio" and, thus, impact all shareholders, including plan participants, on a *pro rata* basis. Deloitte 401(k) Fee Study 15.

As petitioners repeatedly state, the expense ratio is typically higher for retail share classes of mutual funds than for institutional share classes. *E.g.*, Pet. Br. 7, 8. This price difference reflects the fact that the expense ratio is composed of both (1) investment management fees and (2) fees for other, largely administrative services provided to the mutual funds (including recordkeeping and distribution services). By law, the portion of the expense ratio allocated to investment management services must be the same for all fund investors, irrespective of share class. *See* 17 C.F.R. § 270.18f-3(a)(1). But the portion of the expense ratio assessed to cover administrative and other expenses can vary by share class. *See id.* And, because institutional share classes are offered to larger investors who require fewer administrative services, this portion of the expense ratio (and thus the total expense ratio) typically is lower for institutional share classes than for retail share classes.

2. The second category of services required by 401(k) plans includes recordkeeping and other administrative services, such as tracking account balances, processing and managing payroll deductions, sending out account statements and required notices, processing distributions, tax reporting, and so forth. As noted above, 401(k) plans generally engage service providers (many of which are SIFMA members) to perform these duties.

Recordkeeping and administrative fees are typically priced and paid for in one of two ways.

First, the administrative service provider can charge direct, hard-dollar fees on a per-participant or per-transaction basis. *See* DOL 401(k) Plan Fees 3, 4; Deloitte 401(k) Fee Study 5, 15.[8] More often, though, the 401(k) plan's administrative service provider is compensated indirectly, through the receipt of revenue-sharing payments from the service providers for the mutual funds in which plan participants invest. *See* Deloitte Development LLC, Annual Defined Contribution Benchmarking Survey 29 (2014), *available at* http://www2.deloitte.com/content/dam/Deloitte/us/Documents/human-capital/us-cons-annual-defined-contribution-benchmarking-survey2013-081914.pdf [hereinafter Deloitte Benchmarking Survey] (noting that revenue sharing is "[t]he most common arrangement sponsors have for payment of administration and recordkeeping fees").[9] Revenue sharing makes sense because, in

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[8] For example, each calendar quarter a stated dollar amount may be charged against each participant's plan account to pay for recordkeeping services.

[9] Revenue-sharing rates are set in a competitive market, based on negotiations between the mutual fund service providers and the plan service providers. *See* Wendy J. Dominguez, *Retirement Plan Expenses Uncovered*, National Association of Government Defined Contribution Administrators, Oct. 2005, at 2, *available at* http://www.nagdca.org/dnn/portals/45/Publications/Issues/retirementPlanExpenses.pdf ("Revenue sharing is negotiated independently between each mutual fund company and each retirement plan vendor, and it varies depending on the size and clout of the vendor."); Mutual Funds, U.S. Bancorp, https://www.usbank.com/cgi_w/cfm/invest/products_and_services/mutual_funds_ps.cfm (last visited Jan. 22, 2015) ("The amount and type of revenue sharing payments received from a Mutual Fund Product Partner may vary and is subject to negotiation."). The plans themselves play no direct role in the negotiation of revenue-sharing payments.

the case of 401(k) plan investments, the plan's service provider performs many of the administrative services that otherwise would have to be performed by the mutual fund's providers (including tracking individual account balances, sending out individual account statements, and the like).

This pricing mechanism—whereby the mutual fund "expense ratio" is used to cover both investment management services (directly) and the plan's administrative services (indirectly, through revenue sharing)—is often referred to as "bundled pricing." U.S. Dep't of Labor, Pension and Welfare Benefits Administration, Study of 401(k) Plan Fees and Expenses § 3.3.2 (1998), *available at* http://www.dol.gov/ebsa/pdf/401krept.pdf. Bundled pricing arrangements are quite popular: In a recent survey, 47% of plans reported that they relied *exclusively* on bundled pricing for payment of administrative and recordkeeping fees. Deloitte Benchmarking Survey 29.[10]

But however 401(k) plans pay for administrative services—whether through hard-dollar fees, through bundled pricing, or through some combination of

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[10] Moreover, both the courts and the Department of Labor have recognized that bundled pricing is a "common and 'acceptable' investment industry practice[] that frequently inure[s] to the benefit of ERISA plans." *Tussey v. ABB, Inc.*, 746 F.3d 327, 336 (8th Cir. 2014); *see also Hecker*, 556 F.3d at 585; Pet. App. 14, 48-49; U.S. Dep't of Labor, Advisory Op. 2013-03A, at 1-2 (July 3, 2013) [hereinafter DOL Advisory Op. 2013-03A] (suggesting that a fiduciary may prudently enter into a contract with a service provider who receives revenue-sharing payments so long as the sum total compensation received by the service provider, including the revenue-sharing payments, is reasonable); DOL Advisory Op. 97-15A, at 2.

both[11]—the service providers need to be compensated for their services. So if the plan does not fully compensate service providers through revenue sharing, it must compensate them by paying direct, hard-dollar fees.

B. A Prudent Fiduciary Taking Into Account All 401(k) Plan Fees And Expenses Might Well Choose To Offer Retail Share Classes of Mutual Funds.

In presuming that the choice of retail share classes over institutional share classes is "imprudent in any portfolio," Pet. Br. 32, petitioners focus solely on the different expense ratios charged for retail and institutional shares. But a plan fiduciary's job, when making a decision about the plan's investment options, is to assess the total impact of that decision on the plan as a whole.[12] And, in fact, the choice of share class affects more than just the expense ratio paid by plan participants invested in the particular mutual funds at issue. The choice of share class also affects the administrative service fees paid by the plan as a whole, because revenue-sharing payments are typically much smaller or entirely unavailable

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[11] A significant percentage of plans pay for administrative services through some combination of revenue sharing and hard-dollar fees. *See* Deloitte Benchmarking Survey 29 (reporting that 14% of plan sponsors utilized a payment structure that included both direct fees and revenue sharing).

[12] Of course, a fiduciary also considers numerous other factors besides fees when considering and comparing investment options. As the Department of Labor has cautioned, fees should not be considered "in a vacuum. They are only one part of the bigger picture including investment risks and returns and the extent and quality of services provided." DOL 401(k) Plan Fees 9.

for institutional shares. *See, e.g.*, *Healthcare Strategies, Inc. v. ING Life Ins. & Annuity Co.*, 961 F. Supp. 2d 393, 397 (D. Conn. 2013) ("ILIAC receives less revenue sharing from institutional ('I') share classes than from retirement ('R') share classes . . . ."); Pet. App. 84 (noting that the retail share classes in the funds at issue in this case "offered more revenue sharing").

As discussed above, institutional share classes have a "discount" up front, in their expense ratios, to reflect decreased administrative costs. *See supra* Section I.A.1. Necessarily, then, institutional share classes cannot offer the same "discount" on the back end, via revenue sharing. So, if a plan fiduciary selects institutional shares instead of retail shares, the mutual fund's expense ratio may decline, but the amount of revenue sharing available to cover the cost of administrative services will also decline. And, because administrative service providers can and will insist on receiving reasonable compensation for their services, a decline in the total amount of revenue-sharing payments may require such providers to charge a 401(k) plan new or additional hard-dollar, per-participant fees. Accordingly, prudent plan fiduciaries understand that the choice between retail and institutional shares is inherently linked to the choice about how to pay for the plan's administrative services.

Indeed, not only are plan fiduciaries *entitled* to consider the impact of share class on administrative service fees, they are *required* to do so, according to both general rules and specific, on-point guidance from the government. The Department of Labor ("DOL") has repeatedly recognized in regulations and advisory opinions that fiduciary decisions about

which investments to offer cannot be assessed in isolation, and must instead take into account the impact of that decision on the plan *as a whole*. *See* 29 C.F.R. § 2550.404a-1(b) (emphasizing the importance of a totality-of-the-circumstances inquiry); Rules and Regulations for Fiduciary Responsibility; Investment of Plan Assets Under the "Prudence" Rule, 44 Fed. Reg. 37,221, 37,222 (June 26, 1979) ("The Department is of the opinion that . . . the prudence of an investment decision should not be judged without regard to the role that the proposed investment or investment course of action plays within the overall plan portfolio."). And, in fact, DOL has expressly advised that fiduciaries must consider the impact of share class selection on administrative service fees. *See* DOL Advisory Op. 2013-03A, at 3 ("[R]esponsible plan fiduciaries must assure that the compensation the plan pays directly or indirectly to [its service providers] for services is reasonable, taking into account the services provided to the plan *as well as all fees or compensation received by [the service provider] in connection with the investment of plan assets, including any revenue sharing*." (emphasis added)).

Moreover, a fiduciary with discretion to choose between retail and institutional shares (or revenue sharing and hard-dollar administrative fees) may reasonably consider not only the *total cost* of that decision to plan participants, but also *how those costs are distributed*. A prudent fiduciary might take into account, for example, that direct, hard-dollar administrative service fees are often assessed on a per-participant basis (*i.e.*, distributed equally among all plan participants), DOL 401(k) Plan Fees 4, whereas the mutual fund expense ratios subject to

revenue sharing are charged as a percentage of assets under management. Accordingly, in the absence of revenue sharing, lower-balance, lower-income employees—the very individuals who stand to benefit most from investment in 401(k) plans[13]—may shoulder a significantly larger share of the plan's fees. A prudent fiduciary therefore might conclude that, all else being roughly equal, revenue sharing is preferable to fixed, per-participant, hard-dollar fees.

Finally, even where a plan does not use bundled pricing to pay for administrative services, there are still circumstances in which a prudent fiduciary might reasonably choose to offer retail share classes of mutual funds to plan participants. For example, some mutual funds simply do not offer institutional share classes, and others have set minimum investments for institutional shares that sometimes reach into the tens or hundreds of millions of dollars—making them inaccessible to most 401(k) plans.[14] Additionally, fees are only one of many

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[13] *See* News Release, Bureau of Labor Statistics, Employee Benefits in the United States 5 (Mar. 2014), http://www.bls.gov/ncs/ebs/sp/ebnr0020.pdf (reporting that only 22% of workers in the bottom quartile wage group participate in retirement benefits, whereas 79% of wage earners in the top quartile do so).

[14] *See, e.g.*, Pet. App. 90; Vanguard Share Classes, Vanguard, https://advisors.vanguard.com/VGApp/iip/site/advisor/aboutus/philosophy/article?file=IWEShareClassExplanation (last visited Jan. 22, 2015) (listing minimum initial investments of $5 million and $100 million for institutional share classes). Although the district court made an evidentiary finding *in this case* that the minimums set by the funds at issue likely would have been waived for Edison's plan, given its size, Pet. App.

factors that fiduciaries consider in selecting investment options for a 401(k) plan,[15] and other factors may counsel in favor of retail shares. For example, as respondents note, retail share classes may have favorable and established performance histories and ratings that their institutional-share counterparts do not, making investment in retail shares more appealing to plan participants. Resp. Br. 21, 30.

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In short, plan fiduciaries are not only entitled, but required, to consider the full impact on the plan as a whole when choosing between retail and institutional share classes. And when the interests of the plan as a whole are considered, a prudent fiduciary may well have good reason to select retail shares.

III. THE COMPLEXITY OF FACTORS INFLUENCING A FIDUCIARY'S CHOICE BETWEEN RETAIL AND INSTITUTIONAL SHARE CLASSES ILLUSTRATES WHY PETITIONERS' REPOSE ARGUMENT CANNOT BE CORRECT.

Petitioners argue that, despite the express six-year repose provision set forth in 29 U.S.C. § 1113(1), their claims are timely even where the decision to

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161, that will not always be the case, particularly with respect to small plans sponsored by small-business employers.

[15] *See, e.g.*, U.S. Dep't of Labor, Meeting Your Fiduciary Responsibilities, http://www.dol.gov/ebsa/publications/fiduciaryresponsibility.html (last visited Jan. 22, 2015); *see also* DOL 401(k) Plan Fees 9 ("[D]on't consider fees in a vacuum. They are only one part of the bigger picture . . . .")).

select retail share classes was made more than six years before suit. According to petitioners, such a decision is never entitled to repose, because fiduciaries are under a continuing duty to reevaluate it even when nothing has changed since the decision. *See* Pet. Br. 38 n.25, 41 n.28 (asserting that no matter what "the precise scope of an ERISA fiduciary's obligation to review plan investments" may be, it encompasses the "particular circumstance[s]" petitioners identify here—failure to remove retail share classes). But as shown above, choosing between the benefits of retail and institutional share classes requires a context-sensitive analysis, and that analysis is undertaken *before the investment is selected*. Insisting that fiduciaries reengage in this same analysis over and over again, even in the absence of changed circumstances, would lead to an unworkable result that would undermine Congress's clear intent in enacting both the repose provision in particular and ERISA more generally.

Petitioners concede that, for three of the challenged funds, the very decision they question—the selection of retail share classes instead of institutional share classes—was made more than six years before suit. In fact, the very basis of the claim petitioners present to this Court is that *absolutely nothing* happened during the six-year period: "[t]here is no evidence . . . that [respondents] gave any, let alone appropriate, consideration to switching to the institutional classes of those three funds" during the six years before they filed suit. Pet. Br. 40. Petitioners contend that, for a decision of this type, mere inaction is enough to establish a breach "during each quarterly meeting of the investment committees [during the six years prior to suit] at

which they reviewed plan investments but neither considered nor switched to institutional-class shares for [these] three funds." *Id.* at 41.

If petitioners' theory were correct, fiduciaries would essentially be required by ERISA to *constantly* reassess—at each and every meeting, and on each and every phone call—every investment decision previously made, by themselves or by their predecessors. But ERISA fiduciaries "ha[ve] no obligation to continually reassess" every decision previously made. *Novella v. Westchester County*, 661 F.3d 128, 146 (2d Cir. 2011) (internal quotation marks omitted); *see also* Resp. Br. 32-36 (noting that, absent a material change in circumstances, trust law imposes no duty to conduct a full diligence review of investment decisions and instead requires a periodic assessment only of changes to the value or risk of the investment). And, as the precise fact pattern of this case illustrates, this interpretation of ERISA "would make hash out of the limitations period and lead to an unworkable result." Pet. App. 17.

Petitioners and their *amici* drastically understate the complexity of the assessment that fiduciaries must make in order to decide which investment options to offer to plan participants—including decisions about whether to offer retail mutual funds or other types of investment vehicles, and, if mutual funds are selected, whether to offer retail or institutional share classes. Comparing the propriety of various investment options is not a simple comparison of expense ratios. It cannot be accomplished, as one amicus suggests, through a "quick evaluation of the cost basis," AARP Br. 16, and a "simple peer comparison," *id.* at 18. Instead, as DOL and the courts have recognized, there are

many considerations that bear on the determination of what investment options to offer to a plan, including the fee structure, the type of investment vehicle (mutual funds versus institutional investment products, for example), the experience level of the portfolio manager, the reputation of the investment advisor, past fund performance, expected market changes, risk tolerance, current diversification of the plan, and so forth.[16] And many of these factors are not even readily quantifiable, let alone easily weighed.

The decision concerning what share class to offer is similarly complex. As explained above, fiduciaries consider, among other things, the potential benefits offered by revenue sharing, should they choose retail share classes. And, in order to make this assessment, a fiduciary would need to collect information about the nature and extent of the revenue sharing relationship between the mutual fund's service providers and the plan's service

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[16] *See* 29 C.F.R. §2550.404a-1(b) (noting that a fiduciary must "give[] appropriate consideration to those facts and circumstances that, given the scope of such fiduciary's investment duties, the fiduciary knows or should know are relevant to the particular investment or investment course of action involved"); DOL 401(k) Plan Fees 1, 9; *see also Loomis*, 658 F.3d at 671-72 (describing the characteristics and benefits, which are properly considered by plan fiduciaries, of mutual funds versus other investment options, and the benefits of certain fee structures over others depending on the characteristics of plan participants); *In re Unisys Sav. Plan Litig.*, 74 F.3d 420, 438 (3d Cir. 1996) (noting that Congress requires a fiduciary to consider numerous factors, and the "facts and circumstances of each case," in determining the extent to which fund diversification is necessary).

provider,[17] and then compare the expected savings from offering retail shares with revenue sharing, as compared to the savings that the plan could achieve by offering institutional shares. This assessment involves consideration of the extent to which the plan's administrative service provider is (or is not) being sufficiently compensated by revenue sharing from other mutual funds offered by the plan (or by any supplemental hard-dollar payments), and the extent to which anticipated market forces (or changes in participant investment practices) might alter the sufficiency of existing revenue sharing-payments going forward. A prudent fiduciary may then consider, based on these and other factors, whether and to what extent the administrative service provider is likely to increase hard-dollar fees if revenue-sharing payments decrease, or to decrease hard-dollar fees if revenue-sharing payments increase.

As DOL has recognized, this analysis is fact-intensive and complex. *See* DOL Advisory Op. 2013-03A, at 3. It is not something that can be repeated at every investment committee meeting, even for one fund. Yet, if petitioners' argument were correct, then fiduciaries would be required to conduct precisely such an analysis at every meeting not just for one fund, but for every single mutual fund on the plan's investment menu.[18] Nothing in ERISA requires such

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[17] As discussed in note 9, *supra*, revenue-sharing rates are set by the mutual fund advisors and the 401(k) plan administrative service providers; 401(k) plans are not typically part of these negotiations or party to these agreements.

[18] Plans generally offer numerous investment options, including numerous mutual funds, as part of their investment line-up. Indeed, of the plans surveyed by Deloitte in 2013-2014, "[t]he

an unworkable, impractical, and inefficient undertaking.

Instead, as the court of appeals appropriately recognized here, ERISA fiduciaries must reassess past decisions only where relevant circumstances have materially changed. *See* Pet. App. 19. So, for example, if a plan renegotiates its compensation structure with its administrative service provider in a way that renders revenue sharing materially less attractive, then the fiduciary might well be required to reconsider a past decision to offer retail shares.[19] Conversely, if an administrative service provider declares that the present amount of revenue sharing is insufficient to cover its fees, and that it may need to add or increase hard-dollar payments, a fiduciary might have an obligation to reconsider past selections of institutional shares. But, absent such a material change in circumstances, a plan fiduciary cannot be required to constantly reevaluate its past decisions concerning share class.

Petitioners' contrary position—that share class decisions must be constantly reassessed even where the circumstances have not changed *at all*—is not only unworkable, it might well do more harm than good. If the choice between institutional and retail share classes is a close call, then the "right" or "best" decision might fluctuate with even the most modest

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average number of investment options offered per plan was 15," although some offered as many as 100 different choices, and mutual funds were "the most common investment vehicle" offered. Deloitte 401(k) Fee Study 14.

[19] Deloitte reports that approximately one-third of plan service agreements have terms of less than three years, and about 40% are renegotiated every five years or more. *See* Deloitte Benchmarking Survey 38.

changes in market condition. In other words, the fiduciary's choice could change every quarter, meaning that the plan would be required to switch from institutional to retail shares and back again several times a year. But such constant change is not in the participants' best interest: 401(k) plans are *long-term* investment vehicles, and regularly forcing participants to switch from one investment option to another is inconsistent with long-term investment objectives, not to mention extremely confusing to participants who are attempting to track their savings.

Moreover, it would be logistically impractical for a plan to make such regular changes among share classes. Implementing investment changes, including share class changes, can take months. In this case, for example, Edison was required to provide its administrative service provider with two to five months' advance notice of any fund change, including share class conversions. *See* Kobashigawa Supp. Decl., ECF No. 381-3, ¶ 6 (C.D. Cal. Nov. 19, 2009). The service provider, in turn, was required to undertake numerous steps to implement such changes to the plan, including distributing a notice of the change to participants,[20] recoding its recordkeeping software, updating its website for plan

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[20] ERISA requires plan administrators to furnish written notice of a change in investment options to all plan participants and beneficiaries. *See* 29 U.S.C. 1104(c)(4). Additionally, plan fiduciaries must disclose to participants certain investment-related information, including information about the performance and fees of investment options designated under the plan, *see* 29 C.F.R. 2550.404a-5, and such disclosures must be made anew whenever a new investment option (or a new share class of an investment option) is added to the plan's investment menu.

participants, modifying its database, updating its automated telephone system, updating its communications statements that are periodically mailed to participants, updating its call center and training documentation regarding the change, and testing all of its electronic systems to make sure all changes were properly implemented. *Id.* ¶ 5.

Such tasks are time- and labor-intensive. So, if plans were to constantly reassess and change their share-class decisions, the implementation of those choices would lag so far behind as to potentially render the choice outdated. And, perhaps more importantly, the administrative costs associated with making such logistical changes likely would result in a significant increase in the total fees charged by the plan's administrative service provider.

The additional resources that would be required to constantly reassess (and, potentially, to change) share classes offered to the plan cannot be pulled out of thin air. Perhaps some of the largest plan sponsors might be able to field these additional costs with relative ease. But a significant percentage of plan sponsors are small or mid-sized businesses. *See* Deloitte Benchmarking Survey 6 (reporting that more than one-third of plan sponsors surveyed by Deloitte in 2013 and 2014 employed 500 or fewer employees); Stuart Robinson, *Three Myths Keeping Small Businesses From Starting A 401(k)*, Forbes, Sept. 25, 2013, http://www.forbes.com/sites/stuartrobertson/2013/09/25/three-myths-keeping-small-businesses-from-starting-a-401k/ (reporting that 24% of businesses with fewer than 50 employees offer a 401(k) plan).[21] And, if forced to assume these

[21] Indeed, several of SIFMA's members offer products and services that are specifically tailored to 401(k) plans sponsored

additional expenses—or risk the additional expense of defending lawsuits like this one—these plan sponsors might have no choice but to divert resources away from other plan benefits, such as (1) tools to assist participants with retirement planning, (2) personalized investment advising services, and, most notably, (3) employer matching and profit-sharing programs, whereby a plan sponsor contributes directly to participants' retirement savings accounts. *See* Deloitte Benchmarking Survey 11 (reporting that 43% of employees participated in 401(k) plans for the primary reason of taking advantage of an employer match). And, for some of the smallest plan sponsors, these additional administrative costs might be so significant as to impede their ability to offer a 401(k) plan in the first place.

When Congress enacted ERISA, it recognized precisely this concern. As this Court has explained on numerous occasions, Congress "sought to create a system that is [not] so complex that administrative costs, or litigation expenses, unduly discourage employers from offering [ERISA] plans in the first place." *Conkright*, 559 U.S. at 517 (alterations in original) (internal quotation marks omitted); *accord Fifth Third Bancorp v. Dudenhoeffer*, 134 S. Ct. 2459, 2470 (2014) (same); *Heimeshoff v. Hartford*

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by small businesses. *See, e.g.*, Small-Business Plans, Vanguard, https://investor.vanguard.com/what-we-offer/small-business/overview (last visited Jan. 22, 2015); 401(k) for Small Businesses, Fidelity, https://www.fidelity.com/retirement-ira/small-business/401k-plans (last visited Jan. 22, 2015); Small Business 401(k), T.RowePrice, http://individual.troweprice.com/public/Retail/Retirement/Small-Business-Retirement-Plans/Small-Business-401%28k%29 (last visited Jan. 22, 2015); Small Business 401(k), Merrill Edge, http://www.merrilledge.com/small-business/401k (last visited Jan. 22, 2015).

Life & Accident Ins. Co., 134 S. Ct. 604, 612 (2013) (same); *Varity Corp. v. Howe*, 516 U.S. 489, 497 (1996) (same). Petitioners' interpretation of ERISA—requiring constant reassessment of past fiduciary decisions, even in the absence of a material change in circumstances—would lead to precisely the type of undue "administrative costs, or litigation expenses" that Congress sought to avoid. Accordingly, this Court should affirm the decision below and hold that petitioners' claims are time-barred.

CONCLUSION

The judgment of the court of appeals should be affirmed.

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